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No. _____

In the Supreme Court of the United States

October Term, 1987

OAHU GAS SERVICE, INC.,

Petitioner,

v.

PACIFIC RESOURCES INC., GASCO, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Given monopoly power in properly defined relevant product and geographic markets, under what circumstances can an appellate court determine that the monopolist's conduct is procompetitive as a matter of law and under what circumstances must the appellate court abide the fact finder's determination if supported by substantial evidence?

THE PARTIES

Petitioner-plaintiff is Oahu Gas Service, Inc., a distributor of propane in the State of Hawaii. Respondents-defendants are Pacific Resources Inc. and Gasco, Inc. PRI is the parent corporation of Gasco. Gasco, Inc. distributes both propane and synthetic natural gas in the State of Hawaii.

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OPINIONS BELOW

The Ninth Circuit filed three separate opinions in this case. The first opinion was filed on October 9, 1987. A copy of this opinion is attached as Appendix A. The court filed an amended opinion, reported at 829 F.2d 1471 (9th Cir. 1987), on November 27, 1987. A copy of this amended opinion is attached as Appendix B. The first two opinions affirmed in part and reversed in part. On February 1, 1988, the Ninth Circuit withdrew its prior rulings and filed a third opinion, reported at 838 F.2d 360 (9th Cir. 1988). The third opinion reversed *in toto*. This final opinion is attached as Appendix C.

JURISDICTIONAL STATEMENT

The Ninth Circuit filed its third and final opinion in *Oahu Gas Service, Inc. v. Pacific Resources Inc., Gasco, Inc.*, No. 86-2250, on February 1, 1988. The Ninth Circuit denied Oahu Gas Service, Inc.'s timely petition for rehearing and suggestion for rehearing *en banc* on March 22, 1988. A copy of that order is attached as Appendix D. Oahu Gas Service, Inc. filed this Petition for Writ of Certiorari within ninety (90) days of that date. Jurisdiction of this Court is founded on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides in pertinent part:

> Every person who shall monopolize . . . any part of the trade or commerce among the several States . . . shall be deemed guilty . . . .

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in pertinent part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained . . . .

STATEMENT OF THE CASE

A. Statement of Facts.

(1) Overview.

This lawsuit involves the actions of Gasco, Inc. ("Gasco") and its parent, Pacific Resources Inc. ("PRI") to maintain their monopoly of the propane gas market in Hawaii by unreasonably exclusionary conduct.

Until 1972, Gasco was the sole distributor of propane and SNG, an almost perfect propane substitute, in Hawaii. Gasco offered two separate services: it sold propane in tanks and it provided, as a regulated utility, propane and SNG via pipeline.

In December 1972, Oahu Gas Services, Inc. ("OGS") was formed to distribute propane in tanks, in direct competition with both Gasco's tank propane sales and its utility service. Obtaining its supplies from Chevron, the only refiner of commercial grade propane in the islands, OGS was the first and only serious competitive challenge Gasco has ever faced.[1]

Gasco and PRI undertook, at different times, two different strategies to eliminate the new entrant, OGS. Defendants' first strategy was to exacerbate existing propane shortages in Hawaii during a period of government control, thus limiting the amount of propane available to OGS. Appreciating that existing shortages of propane resulting from the Arab oil embargo constituted the best way to limit OGS' ability to challenge Gasco's monopoly, the defendants undertook a variety of actions to ensure that Hawaii's chronic shortage of propane would not be alleviated. Key among these actions was the defendants' decision to halt construction of a long-planned propane recovery unit as part of their ongoing refinery expansion.

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[1] No other viable propane distributor has entered the Hawaiian market successfully. As of trial, there was one new entrant, Aloha LPG Gas, Inc. This company could not, however, be considered a significant competitive factor. The company had no full-time employees and no storage facilities. (RT 14:109-10.) It had only a single truck and was completely dependent on the defendants for propane supplies. (Id. at 109-11.) As of 1985, its share of the market was less than one-tenth of one percent. (Ex. 1318.)

The defendants implemented a second anti-OGS strategy after government controls ended and after they finally built the propane unit. No longer able to exploit shortages in supply, the defendants sought instead to reduce dramatically the plaintiff's revenues by making false offers of low prices to customers under long-term contract with OGS. These "sham" offers by Gasco had the direct and intended effect of forcing OGS to renegotiate its prices mid-contract and reducing its stream of revenues. As a net result of the defendants' conduct, OGS was unable to serve markets on Hawaii's outer islands and to compete vigorously in the propane market in Oahu.

(2) Defendants' Artificial Limits on the Supply of Propane Available to OGS.

The original strategy undertaken by the defendants to stymie their new market rival had as its foundation the maintenance of embargo-related propane shortages in Hawaii. Historically, Gasco purchased its supplies exclusively from Chevron. To reduce its dependency on Gasco as its sole outlet and to introduce competition in the downstream market, Chevron encouraged James Frandsen to form OGS, and eventually contracted with OGS for propane supplies. (Ex. 958.) Gasco responded by attempting to preempt OGS from a reliable source of supply. Gasco urged Chevron to allow it to purchase "every gallon of propane [Chevron] could produce." (Ex. 601; Ex. 1226; Ex. 737.)

Within months of OGS' entry into the Hawaiian propane market, the Arab oil embargo and the subsequent imposition of federal regulatory controls on propane dramatically altered the market for propane in Hawaii. On the one hand, federal price regulations

resulted in a dramatic increase in prices for SNG pipeline customers. (RT 2:106, 108-09; Ex. 650.) SNG, delivered by pipeline to Gasco's utility customers, cost 40%-50% more than OGS' propane in tanks. (Ex. 1237.) Due to its tremendous price advantage, OGS was positioned—subject only to available supply—to capture much, if not all, of Gasco's utility customers.[2] Gasco was painfully aware of this prospect and of the need to curtail OGS' ability to "raid" its vulnerable SNG customer base. (Ex. 650.)

The imposition of regulations, however, greatly advantaged Gasco over its upstart rival in one significant aspect: supply of propane. Under federal regulations, OGS and Gasco were allocated a proportional share of the refined propane in Hawaii based on their historic consumption levels. Because OGS' base period was calculated during its infancy, it received a very small allocation of the total amount of available propane in Hawaii.

Gasco quickly recognized that this limit on OGS' supplies constituted the defendants' most effective means of limiting OGS' price competition and its growth. (Ex. 650.) By ensuring that no expansion in available supplies would occur, Gasco could restrict OGS to those few customers that its existing allocation of propane supplies would permit it to serve. (Ex. 449 at 4; Ex. 1073 at 7-8; Ex. 655.) Thus, by limiting the existing production of propane to that amount currently being refined by Chevron, Gasco could also severely restrict OGS' incursion into its utility customer base without having to reduce prices to match those of its smaller rival. (Ex. 650.)

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[2] As a highly placed Gasco officer admitted, "if OGS had more to sell . . . they [would] sell more." (RT 3:50.)

The defendants were peculiarly able to limit the expansion of propane production in Hawaii due to one simple fact—PRI's refinery subsidiary, Hawaiian Independent Refiners Inc. ("HIRI") had existing plans to add to its refinery a unit to produce propane. As an incidental part of the already undertaken expansion of HIRI's refinery, the propane unit was, in view of Gasco's propane needs, a natural use of the HIRI refinery's by-products. By abandoning the long-scheduled construction of the propane recovery unit, the defendants purposefully limited propane supplies in Hawaii. In addition, on at least two other occasions during this period, Gasco vetoed proposals that would have augmented Chevron's propane production capacity to ensure that OGS would receive no additional propane. (Ex. 1211; Ex. 724.)

Absent the defendants' desire to limit the amount of propane available to OGS, the propane recovery unit would have been built. The propane recovery unit was well beyond the planning stage. Engineering consultants had prepared project specifications, a voluminous environmental impact statement had been filed with the State of Hawaii and defendants had made an application to the Department of the Interior for approval to import crude inputs for the propane unit. (Ex. 1300; Ex. 1360; Ex. 1349.) As evidence of its intentions, HIRI made repeated assurances to its sister subsidiary, Gasco, that it "will be constructing facilities before 1976 which will have the capability of producing approximately 1,000 barrels per operating day of propane." (Ex. 243; Ex. 1331(B).)

Despite testimony at trial by the defendants that their decision to abandon construction of the propane unit

was based on economic considerations (RT 13:101-02), not a single document analyzing or evaluating their business decision was ever produced. Nor did their witnesses offer a single, consistent explanation as to why they abandoned their plans to construct the unit. At trial, Gasco executives, principally its Board Chairman James Gary, testified that they terminated the project because economic studies disclosed that federal regulations made it impossible for them to ascertain the market price and profitability of the venture. (RT 13:101-02.) Challenged to produce even a single such study, Mr. Gary retreated, claiming that in fact he did not make the decision but that the propane unit was "knocked out by the engineers." (RT 6:107.) Not surprisingly, the jury accorded the defendants' purported justification little credibility.[3]

The defendants' decision to abandon their propane refining plans in order to limit the supply available to OGS had profound negative effects in the Hawaiian market. Throughout the period 1973-1980, there were dramatic shortages of propane in Hawaii. These shortages were, in significant part, made up through the importation of high-priced foreign propane. Under existing governmental regulation, Gasco passed through the higher costs of these imported supplies to its customers. (RT 2:78-79.) Between 1973 and 1980, Hawaiian propane consumers paid almost $11.6 million in wholly unnecessary and avoidable increased prices

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[3] Another reason for the jury's skepticism, perhaps, was the fact that at the same time it cancelled the propane unit purportedly because of the uncertainty of federal regulations, HIRI expanded its refinery to produce, for the first time, gasoline, a product that was subject to the same federal price regulations as propane. (RT 6:102-03.)

for propane in order to subsidize the defendants' anti-OGS strategy. (Modified Ex. 1320.)

The defendants' shortage-inducing strategy was not without costs to Gasco. The uncertainties of supply resulting from Gasco's reliance on imported foreign propane were significant throughout the period. As Gasco's Vice President eloquently testified, "We've had tankers stuck on the other side of the Panama Canal, hung up in Australia because of strikes, we couldn't load and on several occasions we were on the brink of running out of gas for our customers." (RT 2:51-52.) In fact, when the propane recovery unit was reapproved in 1981, an important justification given for its construction was "security of propane supply not vulnerable to dock strikes, shipping delays, price swings, etc." (Ex. 213 at 186919.) HIRI also incurred costs due to its abandonment of the unit. When HIRI ultimately did construct the propane recovery unit in 1981, inflation caused the construction costs to exceed the original estimates by three million dollars. (RT 5:90; RT 6:124.)

(3) The 1982 "Blitzkrieg."

With deregulation and the long-delayed construction of HIRI's propane recovery unit, it became impossible for defendants to limit successfully OGS' supplies. The defendants, therefore, abandoned that strategy and devised another plan to drive their smaller rival out of the propane market.

Concerned that a fully supplied OGS could now challenge both Gasco's dominance on Oahu and its 100% monopoly in the outer islands (Ex. 1161), Gasco launched a "blitzkrieg" of key OGS customers. Gasco would approach propane customers it knew to have long-term contracts with OGS and "offer" them propane at

prices below those of OGS. (App. C at C21.) Gasco's solicitations, however, were never intended to capture OGS customers or generate new business. Indeed, Gasco expressly denied that it made these low price offers to OGS' customers in order to encourage them to breach their long-term contracts and switch to Gasco. (*Id.*) Moreover, Gasco's offers to its own customers were far less attractive than those made to OGS' customers and were actually written in such a way as to discourage interest.[4] (*Id.*)

As acknowledged by the jury and Ninth Circuit, Gasco's offers were nothing but "shams," intended not as legitimate price competition but rather to cut into OGS' profits. (*Id.*) Unlike a monopolist's business decision to lower its own prices, Gasco's "blitzkrieg" was merely a ploy to force OGS to lower its prices to existing contract customers.[5] (*Id.*)

As Gasco expected, the "blitzkrieg" substantially reduced OGS' revenues and drove it perilously close to bankruptcy. In fact, it was on the basis of such a showing that the district court in Hawaii entered a Preliminary Injunction in June 1982 to halt Gasco's conduct. (CR 184.)

The impact of the defendants' 10-year campaign had significant adverse economic consequences both for OGS and for competition in the Hawaii propane market. Unable to obtain additional supplies of propane throughout most of the period, OGS was prevented from

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[4] It was not surprising that out of 88 Gasco proposals to its own customers, only 7 were accepted. (Ex. 1155; Ex. 2810.)

[5] As admitted by one of the key Gasco "blitzkrieg" participants, when she presented an "offer" to an OGS customer, she invited him to call OGS to see if they wanted to make a counterproposal. (RT 7:18-19.)

competing for many customers who paid Gasco for utility service at rates up to twice what OGS charged for propane. (Ex. 650.) Even after its propane supply shortage was alleviated in the early 1980's, OGS was still competitively handicapped by Gasco's "blitzkrieg." Because of the reduction in its revenues caused by the defendants, OGS was unable to expand to the outer islands and challenge Gasco's absolute monopoly in those markets.

B. The Court of Appeals' Decisions.

Symptomatic of its confusion regarding this appeal, the Ninth Circuit wrote three separate opinions over a five month period in its effort to resolve the antitrust issues presented. In all three opinions, the Court of Appeals accepted the jury's finding that the relevant product market was propane and that the relevant geographic market was the State of Hawaii. In addition, in all three decisions the Court of Appeals affirmed the jury's conclusion that the defendants had monopoly power.

The Ninth Circuit did not, however, abide the jury's determination that the defendants' efforts to eliminate OGS constituted predatory conduct actionable under Section 2. In all three of its opinions, the Ninth Circuit found, as a matter of law, the defendants' last minute abandonment of the propane recovery unit was permissible under Section 2. Finding that the defendants' stated rationale for abandoning the unit constituted a legitimate business justification, the Court exonerated the defendants.

As for the defendants' "blitzkrieg" against OGS, the Ninth Circuit underwent a dramatic metamorphosis between its first and last opinions. The Ninth Circuit's

first two opinions held that the defendants' program of sham offers were without justification and violative of Section 2. In its third opinion, without inviting OGS to respond to the defendants' pending rehearing petition,[6] the Ninth Circuit abruptly reversed itself, concluding that the "blitzkrieg" was lawful. Holding in essence that Gasco's conduct had no effect other than to compel its smaller rival to lower prices, the court held that the defendants' conduct was "procompetitive" and, therefore, could not be considered actionable under Section 2.[7]

REASON FOR GRANTING THE WRIT

This appeal presents a vital question in the administration of Section 2 of the Sherman Act: who (court or jury) gets to decide whether the conduct of a monopolist is predatory or unreasonably exclusionary? Today, lower courts are carving out free zones of "legitimate" monopolistic behavior purely as a matter of law. Courts have spent much of their energies attempting to pigeonhole a myriad of unique factual controversies into existing categories of per se lawful activities. No court, however, has ever sought to articulate answers to two separate but related questions:

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[6] Defendants petitioned the Ninth Circuit for Rehearing with a Suggestion for Rehearing *En Banc* on the "blitzkrieg" aspect of the case following the issuance of the first opinion. A copy of the defendants' brief in support of that petition is attached as Appendix E. On November 27, 1987, when the Court of Appeals issued its amended opinion, that petition for rehearing had been pending for approximately thirty (30) days.

[7] As if to apologize for reaching this result, the Court pointed out that while the defendants' conduct should not be condoned and probably would have been independently actionable under state tort law, it did not constitute monopolistic conduct under Section 2 of the Sherman Act. (App. C at C22.)

(1) what monopolistic behavior can be held procompetitive as a matter of law, and (2) what monopolistic behavior presents for a jury a justiciable fact issue, the determination of which is subject only to a substantial evidence review standard. This case presents the Court with an opportunity to address these basic questions.

The central goal of antitrust and the foundation upon which it is predicated is the production of the best possible goods and services at the lowest possible price. Although this goal is often best served by maximizing competition among many market participants, the law does recognize that where the ends of lower prices and better products are achieved in a market dominated by a single competitor, antitrust law should not intervene to effect a different outcome. Thus, as articulated by this Court in *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966), a monopolist may acquire or maintain its dominance through superior products, skill or business acumen without evoking the prohibitions of Section 2. As an outgrowth of that doctrine, courts have found little difficulty in holding that product innovation, non-predatory pricing and entry or exit from a market are permissible acts even if done by a monopolist because they benefit consumers through improved products and/or lower prices. *See Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 376 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1574 (1987); *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1193 (9th Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985); *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727 (9th Cir. 1979).

Much monopolistic conduct, however, is not capable of being characterized as uncontrovertedly procompetitive as a matter of law. For example, it would be wholly improper for a court to adjudicate the legality of a monopolist's conduct as a matter of law if the defendant's proffered procompetitive justification is controverted by substantial evidence presented by the plaintiff. *See, e.g., William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1034 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982). Where a factual controversy exists as to the purpose and effect of a monopolist's conduct, the differing versions must be submitted to a fact finder for resolution. *See Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1058 (9th Cir.), *cert. denied*, 464 U.S. 849 (1983); *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 454 (9th Cir. 1979).

Additionally, if a monopolist's conduct cannot be characterized as unequivocally procompetitive, *i.e.*, efficiency enhancing and beneficial to consumers, the question of whether it is unreasonably exclusionary or predatory must be submitted to the finder of fact. *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985). The reasonableness of a defendant's conduct is a paradigm fact question that must be assessed in light of its effect on consumers, the plaintiff and the defendant itself. *See id.; see also Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 702-03 (1969); *Betaseed, Inc. v. U & I, Inc.*, 681 F.2d 1203, 1228 (9th Cir. 1982) (reasonableness of a restrictive practice is a paradigm fact question). On appeal, these factual determinations are to be construed in a light most favorable to the prevailing party and they must be upheld if supported by reasonable evidence. *Continental Ore Co. v. Union*

Carbide & Carbon Corp., 370 U.S. 690, 696 (1962). That contrary inferences may be drawn from the evidence does not justify an appeals court's rejection of a jury's otherwise supportable conclusion. *Id.*; *Tennant v. Peoria & P.U. Railway Co.*, 321 U.S. 29, 35 (1944) (It is not the function of the appellate court to search the record for conflicting evidence in order to take the case away from the jury.); *Lavender v. Kurn*, 327 U.S. 645, 652-53 (1946).

The Ninth Circuit, in refusing to abide the jury's determination that the defendants' anti-OGS strategy unreasonably restrained competition, divined a new approach to Section 2 conduct questions. In essence the court held that if the defendant can proffer *any* evidence of a justifiable business purpose for its conduct, it prevails as a matter of law regardless of whether efficiency has been enhanced or consumers have been benefitted, or whether a jury has already found that justification to be pretext, not real. (App. C. at C18.)

Viewed under the proper analytic framework, the factual record presented to the appellate court does not support its finding that the defendants' conduct was per se lawful. The defendants' decision to terminate the planned expansion of the HIRI refinery to produce propane had the purpose and effect of continuing shortages, increasing prices, adding significant operational costs and obstacles for the defendants and diminishing the ability of a rival to afford consumers the benefits of competition. In addition, the plaintiff submitted substantial evidence in support of its contention that it was OGS and not the economics of the recovery unit that primarily motivated the defendants. As controverted by substantial evidence, the defendants' purported justification was properly for a

jury and should not have been determined unilaterally by the appellate court.

Finally, Gasco's tortious conduct of interfering in OGS' long-term contractual relations in order to reduce the revenue stream of its rival cannot possibly evoke the same protection afforded under *Grinnell* to a monopolist's efforts to compete on the merits. Gasco's "blitzkrieg" presented a factual controversy for the jury as to whether its overall purpose and effect was unreasonably exclusionary or restrictive of competition.

There is, as evidenced by this case, a need for this Court to articulate clearly and concisely how lower courts are to approach their review of monopolistic conduct. Whether the Ninth Circuit's decisions in this case stem from a distrust of the jury system or from a misunderstanding of their appellate function in monopoly cases, it is important that appeals courts be told that it is not their function to take ambiguous monopolistic conduct and force it into a free zone of legitimacy.

For these reasons, the Court should grant certiorari.

ARGUMENT

A. The Ninth Circuit Erred in Finding the Defendants' Conduct Permissible Under Section 2 as a Matter of Law.

The Ninth Circuit, in its three *OGS* opinions, immunized the defendants' conduct without a proper assessment of its impact on efficiency or consumers and without recognizing the jury's assessment of the evidence.

(1) The Defendants' Supply-Related Conduct Was Not Uncontrovertedly Procompetitive.

The Ninth Circuit made two fundamental errors in its assessment of the defendants' supply-related conduct. First, the court disregarded the factual record when it found that the uncontroverted rationale for the defendants' abandonment of the propane recovery unit was concern that the investment would have resulted in negative returns under existing federal price controls. (App. C at C17.)

The factual record contained substantial evidence adduced by the plaintiff that controverted the defendants' financial justification for halting construction of the propane recovery unit. Supporting the jury's conclusion that the defendants' profitability argument was mere pretext, there was never a single document produced containing an analysis of the profitability of the propane project.[8] In addition, the defendants' own witnesses proffered inconsistent rationales for their decision to halt

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[8]The sole evidence relied on by defendants to show that the HIRI propane recovery unit would have been uneconomic was a study by Chevron of the economics of its own refinery operation, unearthed during discovery in this matter. (Ex. 2656.) Contrary

construction of the propane unit.[9] Finally, the jury heard testimony regarding the defendants' other efforts to limit the supply of propane available to OGS.[10] (Ex. 1211.)

The Ninth Circuit's second error was ruling as a matter of law that the defendants' fear of negative returns from the propane unit constituted an absolute bar to liability

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to defendants' characterization, this study did *not* assert that Chevron's propane operations were unprofitable. Rather, it showed only that products other than propane might be, under existing regulations, more profitable. Even if defendants' mischaracterization of this memorandum is accepted, such a post-hoc rationalization of HIRI's decision not to go forward with its plans cannot seriously be considered as adequate proof that the HIRI propane add-on would have been unprofitable. First, defendants, at the time of their decision to halt development of the propane unit, did not have access to Chevron's operating information. Second, even if Chevron's propane unit were not making money, that operation's performance could not be generalized to the defendants, who, unlike Chevron, had supply demands from the integrated distributor, Gasco, that enhanced the value of the contemplated supply of propane. (Ex. 1331(A).)

[9] On his first day on the stand, Mr. Gary, PRI's Chairman, testified that he "could never get our people pinned down on . . . an accurate cost estimate" because Gasco "could never understand the federal pricing regulations sufficiently to know what we could charge for propane." (RT 5:65.) He also testified that he personally decided to abandon the unit (RT 5:79) and that there was an economic analysis memorializing that decision. (RT 5:178.) Counsel for the plaintiff, at that point, directly challenged him to produce that proffered analysis the next day. (RT 5:179.) On the next day, however, Mr. Gary, unable to locate any such analysis (RT 6:130-31), began to retreat. Directly contrary to his earlier testimony, Mr. Gary testified that the decision to cancel the propane unit never reached him "because it was knocked out by the engineers." (RT 6:107.)

[10] For example, when a Gasco employee suggested a permanent exchange of HIRI-produced by-products in return for Chevron propane, Gasco rejected the offer because the production of additional propane in Hawaii would be "detrimental to Gasco's marketing in the long term" in that a part of the increased supply would be allocated to OGS under federal regulations. (Ex. 1211.)

under *Grinnell's* exception for business acumen. The court, as many appellate courts have done, did not evaluate the efficiency implications of the defendants' conduct before labelling it per se lawful. Rather, relying on a Webster's definition of business acumen, the court merely pigeonholed the defendants' avoidance of unprofitable investments as one of the enumerated *Grinnell* defenses and declared the conduct permissible under Section 2.

The conduct presented in this case demonstrates the danger of an appellate court using labels to distinguish lawful from unlawful conduct. Before exculpating monopolistic conduct, the court should look not to a list of categorical free zones for its analysis, but rather to the underlying efficiency justifications upon which those absolute defenses are grounded. Thus, before exonerating a defendant, the court has to ensure that the conduct enhances efficiency and benefits consumers.

Had the Ninth Circuit evaluated the defendants' supply restrictive strategy in light of its overall effects on efficiency and consumers, it could not have concluded that the conduct qualifies for immunity as a matter of law under the business acumen exception. The defendants' decision to abandon the propane recovery unit had profound adverse effects on consumers, OGS and the defendants themselves. Consumers paid for the defendants' decision to limit local propane supplies through higher prices, necessitated by Gasco's reliance on expensive imported propane.

Not only was OGS directly and intentionally injured by the defendants' conduct, but the defendants themselves were harmed by their inability to secure safe and guaranteed sources of supply. In addition to the uncertainty created by Gasco losing an integrated source

of propane supplies, the defendants incurred the expense of having to locate scarce supplies and import them to Hawaii. Moreover, the six or seven year delay in actually constructing the unit cost HIRI $3 million in inflated construction costs. These costs were never considered by the Ninth Circuit in its determination that construction of the propane unit would have resulted in negative returns.

As this analysis of the record illustrates, it was error for the Ninth Circuit to elevate the defendants' justification to per se lawful conduct without a careful examination of whether the conduct had the net effect of producing better products at lower prices or otherwise benefitting consumers. The court's analysis, citing only to "economic necessity" as sufficient to satisfy *Grinnell's* business acumen exception, failed to consider the ample evidence in the record supporting the jury's conclusion that the conduct was unreasonably restrictive of competition and not otherwise justified as legitimately efficiency enhancing or beneficial to consumers.

Based on the testimony of witnesses and examination of the trial exhibits, the jury's conclusion that the defendants' stated justification was not credible was supported by substantial evidence. *Cf. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 296 n.7 (1985) (Court observed that purported procompetitive justifications could indeed be pretext to conceal anticompetitive animus and that such evaluations were part of the rule of reason analysis.). The appellate court's rejection of the jury's conclusions constitutes, without more, reversible error. *Lavender*, 327 U.S. at 752-56 ("Where . . . there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts

are inconsistent with its conclusions. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.").

(2) The "Blitzkrieg" Conduct Was Incorrectly Viewed by the Ninth Circuit as Procompetitive.

The sudden and unexplained reversal of the Ninth Circuit's position in its two earlier opinions regarding the illegality of the Gasco "blitzkrieg" is unexplainable. In the first opinion, the court, applying a clear and convincing evidence standard, found that Gasco's "blitzkrieg" of OGS' customers was predatory. (App. A at A13.) This position was emphasized even more forcefully in the court's amended opinion. "This is not a predatory pricing case. The evidence relevant to the finding of predatory conduct in this case is not the prices Gasco offered. It is the contracts themselves and the testimony about how those contracts were offered to customers of Gasco and [OGS]." (App. B at B12-B13.)

Employing the efficiency calculus articulated in this petition, the Ninth Circuit in its amended opinion considered the impact of the conduct on market performance and consumer welfare. "If conduct by a monopolist does not enhance the quality or attractiveness of the product, reduce its costs, or alter the demand function that all competitors confront, and is driven by a purpose to create a monopoly by means other than fair competition, it violates section 2." (*Id.* at B13.) The court then concluded that the defendants' fraudulent offers of cut prices, the only rationale for which was to drive rivals out of the market, were within the ambit of Section 2's prohibitions. (*Id.*)

Two months after filing its amended opinion, the Ninth Circuit renounced its prior position regarding the "blitzkrieg." Deciding that because a select number of OGS' customers received the benefit of lower prices indirectly through Gasco's interference, the court found the defendants' actions procompetitive as a matter of law. (App. C at C21-C22.)

Where the court's "blitzkrieg" analysis errs is in its application to the specific facts presented to the jury. The record in this case shows that the nature and intensity of competition between these entities in a geographically isolated market was truly diminished as a result of the defendants' conduct. To conclude otherwise, the Ninth Circuit had to ignore evidence that: (1) this was a two-competitor market; (2) OGS had to seek and secure a preliminary injunction in order to save its business from the Gasco "blitzkrieg"; (3) OGS, had it been able to maintain its existing revenue stream, was a likely entrant into the outer islands, where Gasco maintained a 100% monopoly, so that the "blitzkrieg" operated both as a warning and an effective method to thwart OGS' expansion to the outer islands; and (4) the diminution of OGS' revenue stream as a result of the "blitzkrieg" had the attendant effect of limiting its ability to finance improvements to its plant and equipment and to expand its market share on Oahu by offering enhanced services and lower prices to its actual and potential customers.

It is preposterous to conclude, as did the Ninth Circuit, that the defendants' conduct enhanced long-term competition in the relevant market merely because a single customer group received a temporary price reduction. As clearly established in the Ninth Circuit, the imposition of above-cost prices by a monopolist can constitute predatory conduct where the justification is

based, not on their effectiveness in minimizing losses, but on their tendency to eliminate rivals. *Inglis*, 668 F.2d at 1014.

This was a case in which the defendants' imposition of lower prices on OGS was undertaken not to minimize Gasco's losses, but solely to eliminate its smaller rival. Thus, the defendants' conduct was improperly adjudicated procompetitive as a matter of law. The Ninth Circuit's intervention constitutes error and illustrates vividly the need for this Court to clarify how the question of lawful conduct under Section 2 should be assessed and by whom.

CONCLUSION

The Ninth Circuit has turned the analysis of a monopolist's conduct on its head. Now, instead of subjecting the defendants' actions to an efficiency analysis as dictated in *Aspen*, appeals courts are free to select any justification proffered by the monopolist and, disregarding evidence that it is merely pretext, elevate that justification to one that is exempt from the antitrust laws.

The Ninth Circuit's decision in this case will be comforting to those leading the attack on antitrust. But it is a serious blow to small competitors like OGS who dare to challenge a monopolist and offer the consumer lower-priced alternatives. Does this Court want to encourage and endorse, by benign neglect, the kind of conduct evidenced in this case? OGS urges the Court to grant certiorari and review the decision below.

Dated: June 20, 1988

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OAHU GAS SERVICE, INC.,
Plaintiff-Appellee,

v.

PACIFIC RESOURCES INC., GASCO, INC.,
Defendants-Appellants.

No. 86-2250
D.C. No. CV-77-0444-PGR
OPINION

Argued and Submitted
August 10, 1987—San Francisco, California

Filed October 9, 1987

Before: Eugene A. Wright, Jerome Farris and David R. Thompson, Circuit Judges.

Opinion by Judge Farris

Appeal from the United States District Court
for the District of Hawaii
Paul G. Rosenblatt, District Judge, Presiding

SUMMARY

Antitrust

Appeal from judgment. Affirmed in part, reversed in part, remanded in part.

Appellants Gasco, a subsidiary of Pacific Resources, was the sole retail seller of propane gas in Hawaii. In 1972, appel-

lee Oahu Gas Service began selling propane on Oahu. Both of their propane supplies came from Chevron. During the energy crisis, price controls on domestically produced propane led Chevron to produce the minimum required by the Department of Energy. Gasco bought increasing amounts of propane from foreign suppliers. Oahu Gas repeatedly applied to, and finally received from, the Department for larger allocation of propane. One basis for Oahu's Sherman Act allegations was the decision of Hawaiian Independent Refinery, Inc., a subsidiary of Pacific Resources, not to produce propane in the 1970s. The refinery expanded only to permit gasoline production. After price controls ended, the refinery was modified to produce propane. Another basis for Oahu's allegations was Gasco's marketing program in 1982. With the end of regulation, Gasco began a marketing program that included offers of low-cost long-term contracts to large-volume purchasers, both its own customers and Oahu Gas customers. Oahu asserted at trial that the offers were "shams," designed to force Oahu to cut prices to its own customers. Oahu sought and obtained an injunction prohibiting Gasco from soliciting Oahu's customers while they were under contract to Oahu. Oahu's claims of monopolization and attempted monopolization went to trial. The jury returned a verdict in favor of Oahu and found treble damages and awarded attorneys fees.

[1] The offense of monopolization under Section 2 of the Sherman Act has two elements: the possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product or business acumen. [2] The jury's finding that Gasco had monopoly power in the whole Hawaiian propane market is consistent with the Court's view that monopoly power involves the potential for genuine adverse effects on competition. [3] This court determines antitrust liability by asking whether Pacific Resources' decision not to expand its refinery unnecessarily excluded competition. Because producing propane would

have been uneconomical at the time. Pacific Resources' decision to forego propane production did not exclude competition *unnecessarily*. [4] At trial, a plaintiff in Oahu's position must show by clear and convincing evidence that the defendant's pricing policy had a predatory rationale. The evidence is not the prices Gasco offered, it's the contracts themselves and how they were offered to customers. [5] The jury may be presumed to have accepted Oahu's claim that the cut-rate contracts were "shams," and evidence in the record supports this claim. [6] Because this court partially reverses the judgment, the district court, on remand, must strike the damages based on the refinery episode. As for the damages based on the 1982 marketing campaign, this court affirms.

COUNSEL

William S. Boyd, San Francisco, California, for the defendants-appellants.

Maxwell Blecher, Los Angeles, California, for the plaintiff-appellee.

OPINION

FARRIS, Circuit Judge:

Oahu Gas Services, Inc., sued Pacific Resources, Inc., under Section 2 of the Sherman Act for monopolization and attempted monopolization of propane sales in Hawaii. Oahu Gas alleged that Pacific Resources' unlawful conduct included: (1) a decision in 1974 not to begin producing propane and (2) a campaign in 1982 to force Oahu to lower prices by offering sham cut-rate contracts to Oahu's customers. After trial, a jury found in favor of Oahu and awarded treble damages of $4,963,998.00. Pacific Resources appeals the

denial of its motion for judgment notwithstanding the verdict.

BACKGROUND

Until 1972, Gasco, a subsidiary of Pacific Resources, was the sole retail seller of propane gas in Hawaii. It received virtually all its propane from Chevron, which operated the only propane refinery in Hawaii. In 1972, Oahu Gas Service was formed and began selling propane on Oahu. Its propane supplies also came from Chevron. Beginning in 1973, the federal government controlled the price and allocation of propane. The base period for determining allocations was May 1972, before Oahu Gas had begun business. Oahu therefore had to apply to the Department of Energy for a "base period volume" of propane that Chevron would be required to supply.

During the energy crisis, price controls on domestically produced propane led Chevron to produce the minimum required by the Department of Energy. Gasco bought increasing amounts of propane from foreign suppliers. During these years, Oahu Gas repeatedly applied to the Department of Energy for larger allocations of propane. Gasco opposed these applications because giving Oahu more low-cost domestic propane would require Gasco to buy more expensive foreign propane, thus increasing Oahu's cost advantage. The Department of Energy denied Oahu's requests until, in July 1979, the Department increased Oahu's share of domestic propane on the condition that Oahu pay Gasco $163,108.00 to offset some of Gasco's additional costs for importing more foreign propane.

One basis for Oahu's Sherman Act allegations was the decision of Hawaiian Independent Refinery, Inc. — a subsidiary of Pacific Resources — not to produce propane in the 1970s. Hawaiian Independent Refinery began operating a petroleum refinery in 1972, producing chiefly military fuels. In early

the market on Oahu declined steadily. By 1983, before the trial, Oahu sold about 30% of the propane in Oahu. Oahu Gas dominated sales to high-volume commercial and industrial users on Oahu, supplying 78% of that sub-market in 1985. Gasco supplied about 20% of those customers; Aloha Gas supplied the remaining 2%. Oahu Gas did not sell propane in the outer islands.

Oahu's claims of monopolization and attempted monopolization went to trial in 1985. The jury returned a verdict in favor of Oahu and found treble damages of $4,963,998.00. The court also awarded attorneys fees of $873,324.00.

DISCUSSION

1. *Monopoly Power in the Relevant Market*

[1] The offense of monopolization under Section 2 of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *see also Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1347 (9th Cir. 1986) (making explicit as a third factor the implicit requirement of "causal antitrust injury"). The jury found that Gasco had monopoly power in the relevant market from 1972 to 1982, when its alleged exclusionary conduct took place. Because Pacific Resources is appealing from the denial of a motion for judgment notwithstanding the verdict, we review the evidence on this factual issue in the light most favorable to Oahu and draw all reasonable inferences in Oahu's favor. *Peterson v. Kennedy*, 771 F.2d 1244, 1252 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1642 (1986); *see also Forro Precision, Inc. v. I.B.M. Corp.*, 673 F.2d 1045, 1058 (9th Cir. 1982) (describing the standard of review for a motion to direct verdict, which is the same as the standard for JNOV). "A JNOV is

improper if reasonable minds could differ over the verdict." *Peterson*, 771 F.2d at 1252.

There is no question that Gasco, a subsidiary of Pacific Resources, distributed 100% of Hawaii's propane in 1972, before Oahu Gas entered the market. Gasco is still the only supplier of propane on the outer islands. Pacific Resources contends, however, that the decline of Gasco's market share after Oahu entered the market and Aloha's entry into the market show that Gasco did not have monopoly power. Pacific Resources also contends that the relevant market consists of large-scale consumers of propane on Oahu, rather than the whole propane market. If so, Oahu Gas actually had a much larger share of that "submarket" by 1985 than did Gasco.

Determining the relevant market typically requires an inquiry into the nature of the product, *see, e.g., United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956), and the geographical area of effective competition. *United States v. Grinnell*, 384 U.S. at 575-76. Determining the existence of monopoly power in the particular market usually depends on market share and barriers to entry, but the inquiry focuses more generally on the power to "control prices or exclude competition." *U.S. v. duPont*, 351 U.S. at 391. The factors to consider may vary from case to case, so no one factor is determinative: "Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as reduction of output' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effect.' " *FTC v. Indiana Federation of Dentists*, 106 S. Ct. 2009, 2019 (1986).

[2] The jury's finding that Gasco had monopoly power in the whole Hawaiian propane market is consistent with the Court's view that monopoly power involves "the potential for

genuine adverse effects on competition." That Gasco completely dominates Hawaii's outer islands is evidence supporting the jury's finding of monopoly power. Evidence about the difficulty of entry to the propane market also supports the jury's finding. The jury could reasonably have concluded that Oahu's success in capturing a significant market share on Oahu may have been due to the "insider" status of its founder, once an executive with Gasco, who took some large accounts with him when he left Gasco. The only other new entrant to the market, Aloha Gas, has remained very small. Viewing all this evidence in the light most favorable to Oahu, we hold that the jury could reasonably conclude that Gasco had monopoly power in the relevant market.[1]

2. *The Decision Not to Expand the Refinery*

The second element of monopolization under Section 2 of the Sherman Act is "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *U.S. v. Grinnell*, 384 U.S. at 570-71; *see also Catlin v. Washington Energy*, 791 F.2d at 1347. The jury was asked to determine whether "business acumen" or anticompetitive, exclusionary motives lay behind Pacific Resources' 1972 decision not to modify its Hawaiian Refinery to permit propane production. Whether particular conduct is anticompetitive under the Sherman Act is a question of law that we review *de novo*. *Western Concrete Structures Co. v. Mitsui & Company (U.S.A.), Inc.*, 760 F.2d 1013, 1016 (9th Cir.), *cert. denied*, 106 S. Ct. 230 (1985).

The factual questions about Pacific Resources' allegedly exclusionary conduct in the early 70s were resolved at trial. It was clear that expanding the refinery to permit propane pro-

[1]Because we uphold the jury's finding of monopoly power, we need not consider the attempted monopolization claim that was an alternative ground for the jury's verdict.

duction would have been uneconomical under federal price controls in place at the time. It was also clear, however, that the decision not to produce propane had been based not only on economic factors but also on a desire to restrict the supply of propane potentially available to Oahu Gas. There is evidence in the record that the management of Pacific Resources worried that increasing the supply of propane in Hawaii would result in Oahu's getting more propane to sell, increasing its market share.

The desire to maintain or increase one's market share is not in itself an antitrust violation, of course. Nor is a decision to forego the production of propane an illegal act *per se*. But a monopolist must take care that otherwise lawful acts do not have anticompetitive effects because of its monopoly power. We therefore reject Pacific Resources' broad contention that the antitrust laws may never impose duties on a monopolist to aid its competitors. Because of a monopolist's special position the antitrust laws impose what may be characterized as affirmative duties.[2]

[3] Instead of focusing on affirmative duties or on acts versus omissions, we determine antitrust liability by asking whether Pacific Resources' decision "unnecessarily excluded competition." *Greyhound Computer Corp. v. I.B.M. Corp.*, 559 F.2d 488, 498 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978). Because producing propane would have been uneconomical at the time, Pacific Resources' decision to forego propane production did not exclude competition *unnecessarily*. The economic rationale, even if not the only rationale for the decision, excluded competition *necessarily*. Economic necessity distinguishes this conduct from "willful acquisition or

[2]For example, a ski resort with monopoly power was required to continue a marketing arrangement with its small neighbor where that arrangement increased competition, benefited consumers, and was not uneconomical for the monopolist. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

maintenance of [monopoly] power," *U.S. v. Grinnell*, 384 U.S. at 570-71, because it involved the "business acumen" that *Grinnell* specifically exempts from antitrust liability. *Id.* The jury was improperly given an either/or choice. It was told that it could decide whether Pacific Resources' decision was based on economic motives *or* on a desire to maintain its market share.[3] It should have been instructed that the desire to maintain market power — even a monopolist's market power — cannot create antitrust liability if Pacific Resources' production of propane would have been uneconomical.

Two lines of cases support our holding, though they are not directly controlling. A line of "product innovation" cases has consistently rejected antitrust liability for a monopolist's decision about when or whether to market new products. *See, e.g., Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 545 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984); *California Computer Products v. I.B.M. Corp.*, 613 F.2d 727 (9th Cir. 1979); *see also GAF Corporation v. Eastman Kodak Co.*, 519 F. Supp. 1203, 1232 (S.D.N.Y. 1981) ("no court has yet found a monopolist's failure to market a product as satisfying § 2's conduct requirement."). These cases, involving technological innovations, have held that the contested marketing decisions derived from "a superior product," and are therefore exempt from antitrust liability. Oahu Gas contends that such cases are inapposite, because the product at issue here is propane, hardly an innovation. But "business

[3]The jury instruction on this issue was as follows:

> To sum up, you must determine whether PRI and Gasco maintained monopoly power in a relevant market by policies and conduct which were not legitimate business decisions but were instead designed primarily to further any domination of a relevant market. . . .
>
> You should seek to determine if the challenged conduct is supported by legitimate business reasons *or* whether it was a deliberate effort to injure a smaller rival which caused defendants to sacrifice short-run benefits and consumer good will.

acumen" — the economics of timing a technological innovation — is also an aspect of these cases. In *California Computer* we specifically addressed the issue of when a question of legitimate business purpose may go to a jury. Where IBM redesigned products in such a way that they were incompatible with a competitor's products, and where such design changes were justified "by reason of lower manufacturing cost and price or improved performance[,] . . . [t]he reasonableness of IBM's conduct . . . did not present a jury issue." *California Computer Products*, 613 F.2d at 744.

Another line of cases that Oahu asks us to consider are "supply restriction" cases. Oahu contends that Pacific Resources impermissibly sought to restrict the supply of propane in the Hawaiian Islands. *See, e.g., NCAA v. Board of Regents*, 468 U.S. 85 (1984); *Litton Systems, Inc. v. AT&T*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976). A theory of liability based on "supply restriction" must fail because Pacific Resources had no monopoly power over *supplies* of propane to Hawaii. Chevron produced all Hawaiian propane until 1982.[4] Contrary to Oahu's argument, the regulatory scheme in place in the 70s did not give Pacific Resources control over propane supplies. Oahu appealed to the Department of Energy for larger allocations of propane, and it was ultimately successful. Oahu's supply restriction theory cannot support antitrust liability for Pacific Resources' decision not to produce propane.

As a matter of law, therefore, we reverse the judgment of antitrust liability based on the refinery episode.

[4]For this reason the "essential facilities" theory would not apply either. *See MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) (plaintiff must show control of the essential facility by a monopolist).

3. *Gasco's 1982 Marketing Campaign*

The jury found that Gasco's 1982 campaign to offer cut-rate contracts to large propane purchasers was anticompetitive and predatory. Pacific Resources contends that its offers of lower prices were *per se* lawful because they were above average total cost. *See California Computer*, 613 F.2d at 740-42 (finding no antitrust liability where IBM's lower prices were "cost-justified" even though they had the express purpose of forcing competitors to lower prices and lose profits). Oahu concedes that the prices Gasco offered were above average total cost, but argues that they are nonetheless predatory because Gasco's rationale was "to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power." *Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1035 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

[4] At trial, a plaintiff in Oahu's position must show by "clear and convincing evidence" that the defendant's pricing policy had a predatory rationale. *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1193 (9th Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985). We review the evidence on this factual issue in the light most favorable to Oahu and draw all reasonable inferences in Oahu's favor. *See Peterson v. Kennedy*, 771 F.2d at 1252. "A JNOV is improper if reasonable minds could differ over the verdict." *Id.* We may infer from the jury's verdict that it found the evidence about the 1982 marketing campaign "clear and convincing." The relevant evidence is not the prices Gasco offered. In the typical predatory price-cutting campaign, a monopolist is willing to risk losses in the short-run to eliminate a competitor. If Oahu's allegations are true, however, Gasco was not taking such a risk because the cut-rate contracts it offered were shams. The relevant evidence, therefore, is the contracts themselves and the testimony about how those contracts were offered to customers of Gasco and Oahu.

[5] The evidence reasonably supports the jury's finding of a predatory rationale in the 1982 marketing campaign. The jury may be presumed to have accepted Oahu's claim that the cut-rate contracts were "shams," and evidence in the record supports this claim. Most of the Oahu Gas customers solicited by Gasco were known to have had long-term contracts with Oahu that they would be unlikely to break. A Gasco employee testified that when making the offer to an Oahu customer, she invited the customer to ask Oahu to meet or beat the offered price cut. The jury may also be presumed to have found credible Oahu's evidence that Gasco did not make the same offers to its own customers as it did to Oahu's customers. On this record, the trial court's denial of the JNOV was not improper. We therefore affirm that portion of the judgment based on the jury's finding that Gasco's marketing campaign in 1982 was anticompetitive and predatory under Section 2 of the Sherman Act.

4. *Damages*

[6] Because we partially reverse the judgment, the district court, on remand, must strike the damages based on the refinery episode. As for the damages based on the 1982 marketing campaign, we must affirm that portion of the award unless it is clearly unsupported by the evidence. *Chalmers v. City of Los Angeles*, 762 F.2d 753, 760 (9th Cir. 1985); *see also, Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 836 (9th Cir. 1982) ("[A]n antitrust plaintiff is only obligated to provide the trier-of-fact with some basis from which to estimate reasonably, and without undue speculation, the damages flowing from the antitrust violations.").

Damages flowing from the 1982 marketing campaign were fixed at $421,481.00, before trebling. This was the amount Oahu lost due to the reduced prices it gave from April 30, 1982, through November 30, 1983, to those customers who were solicited for cut-rate contracts by Gasco. Pacific Resources contends that its actions did not cause Oahu's

losses. It argues that with the June 1982 injunction against Gasco's campaign, Oahu need not have kept its prices lowered. Any losses from reduced prices after June 30, 1982, were therefore voluntary. Whether Oahu was able to raise its prices again immediately after the injunction is an issue of fact that the jury resolved against Pacific Resources. We do not find this conclusion clearly erroneous and therefore affirm the amount of damages based on the marketing campaign.

Because our partial reversal will reduce the overall damage award, the district court on remand must also recalculate the amount of the award for attorney's fees.

Affirmed in part, reversed in part, and remanded for adjustment of damages and attorney's fees in accordance with this opinion.

OAHU GAS SERVICE, INC. v. PACIFIC RESOURCES INC.

CITE AS: 829 F.2d 1471 (9th Cir. 1987)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OAHU GAS SERVICE, INC.,
Plaintiff-Appellee,

v.

PACIFIC RESOURCES INC., GASCO, INC.,
Defendants-Appellants.

No. 86-2250

D.C. . No. CV-77-0444-PGR

AMENDED OPINION

Appeal from the United States District Court
for the District of Hawaii
Paul G. Rosenblatt, District Judge, Presiding

Argued and Submitted
August 10, 1987—San Francisco, California

Decided October 9, 1987
Amended November 27, 1987

Before: Eugene A. Wright, Jerome Farris and David R. Thompson, Circuit Judges.

Opinion by Judge Farris

SUMMARY

Antitrust

Appeal from judgment. Affirmed in part, reversed in part, remanded in part.

Appellants Gasco, a subsidiary of Pacific Resources, was the sole retail seller of propane gas in Hawaii. In 1972, appel-

lee Oahu Gas Service began selling propane on Oahu. Both of their propane supplies came from Chevron. During the energy crisis, price controls on domestically produced propane led Chevron to produce the minimum required by the Department of Energy. Gasco bought increasing amounts of propane from foreign suppliers. Oahu Gas repeatedly applied to, and finally received from, the Department for larger allocation of propane. One basis for Oahu's Sherman Act allegations was the decision of Hawaiian Independent Refinery, Inc., a subsidiary of Pacific Resources, not to produce propane in the 1970s. The refinery expanded only to permit gasoline production. After price controls ended, the refinery was modified to produce propane. Another basis for Oahu's allegations was Gasco's marketing program in 1982. With the end of regulation, Gasco began a marketing program that included offers of low-cost long-term contracts to large-volume purchasers, both its own customers and Oahu Gas customers. Oahu asserted at trial that the offers were "shams," designed to force Oahu to cut prices to its own customers. Oahu sought and obtained an injunction prohibiting Gasco from soliciting Oahu's customers while they were under contract to Oahu. Oahu's claims of monopolization and attempted monopolization went to trial. The jury returned a verdict in favor of Oahu and found treble damages and awarded attorneys fees.

[1] The offense of monopolization under Section 2 of the Sherman Act has two elements: the possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product or business acumen. [2] The jury's finding that Gasco had monopoly power in the whole Hawaiian propane market is consistent with the Court's view that monopoly power involves the potential for genuine adverse effects on competition. [3] This court determines antitrust liability by asking whether Pacific Resources' decision not to expand its refinery unnecessarily excluded competition. Because producing propane would

have been uneconomical at the time, Pacific Resources' decision to forego propane production did not exclude competition *unnecessarily*. [4] At trial, a plaintiff in Oahu's position must show by clear and convincing evidence that the defendant's pricing policy had a predatory rationale. The evidence is not the prices Gasco offered, it's the contracts themselves and how they were offered to customers. [5] The jury may be presumed to have accepted Oahu's claim that the cut-rate contracts were "shams," and evidence in the record supports this claim. [6] Because this court partially reverses the judgment, the district court, on remand, must strike the damages based on the refinery episode. As for the damages based on the 1982 marketing campaign, this court affirms.

COUNSEL

William S. Boyd, San Francisco, California, for the defendants-appellants.

Maxwell Blecher, Los Angeles, California, for the plaintiff-appellee.

OPINION

FARRIS, Circuit Judge:

Oahu Gas Services, Inc., sued Pacific Resources, Inc., under Section 2 of the Sherman Act for monopolization and attempted monopolization of propane sales in Hawaii. Oahu Gas alleged that Pacific Resources' unlawful conduct included (1) a decision in 1974 not to begin producing propane and (2) a campaign in 1982 to force Oahu to lower prices by offering sham cut-rate contracts to Oahu's customers. After trial, a jury found in favor of Oahu and awarded treble damages of $4,963,998.00. Pacific Resources appeals the

denial of its motion for judgment notwithstanding the verdict.

BACKGROUND

Until 1972, Gasco, a subsidiary of Pacific Resources, was the sole retail seller of propane gas in Hawaii. It received virtually all its propane from Chevron, which operated the only propane refinery in Hawaii. In 1972, Oahu Gas Service was formed and began selling propane on Oahu. Its propane supplies also came from Chevron. Beginning in 1973, the federal government controlled the price and allocation of propane. The base period for determining allocations was May 1972, before Oahu Gas had begun business. Oahu therefore had to apply to the Department of Energy for a "base period volume" of propane that Chevron would be required to supply.

During the energy crisis, price controls on domestically produced propane led Chevron to produce the minimum required by the Department of Energy. Gasco bought increasing amounts of propane from foreign suppliers. During these years, Oahu Gas repeatedly applied to the Department of Energy for larger allocations of propane. Gasco opposed these applications because giving Oahu more low-cost domestic propane would require Gasco to buy more expensive foreign propane, thus increasing Oahu's cost advantage. The Department of Energy denied Oahu's requests until, in July 1979, the Department increased Oahu's share of domestic propane on the condition that Oahu pay Gasco $163,108.00 to offset some of Gasco's additional costs for importing more foreign propane.

One basis for Oahu's Sherman Act allegations was the decision of Hawaiian Independent Refinery, Inc. — a subsidiary of Pacific Resources — not to produce propane in the 1970s. Hawaiian Independent Refinery began operating a petroleum refinery in 1972, producing chiefly military fuels. In early

1973, before price controls went into effect, Hawaiian planned to modify its refinery to permit production of propane and gasoline. The plans assumed that the modifications could be completed by 1976 and that Gasco would be the chief customer for propane. Under price controls, however, Hawaiian's propane would have had the same ceiling price as Chevron's. Thus the refinery expanded only to permit gasoline production, which began in May 1975. After price controls ended in 1981, the refinery was modified to produce propane. It has sold propane to Gasco and to Aloha Gas, a small new propane distributor. It has expressed a willingness to sell propane to Oahu Gas.

Another basis for Oahu's allegations was Gasco's marketing program in 1982. During the energy crisis, demand for propane fell as consumers turned to alternative energy sources. With the end of regulation in 1981 and the beginning of propane production at Hawaiian's refinery in 1982, propane supplies became more plentiful. Gasco began a marketing program in 1982 that included offers of low-cost long-term contracts to large-volume purchasers, both its own customers and customers served by Oahu Gas. The prices offered were above Gasco's average total cost of supplying propane, but Oahu asserted at trial that the offers were "shams," designed to force Oahu to cut prices to its own customers. Oahu did cut prices to those customers, resulting in such low profits, Oahu claims, that it was nearly put out of business. None of Oahu's customers accepted Gasco's offers. Several of Gasco's own customers accepted the offers. In June 1982, Oahu sought and obtained an injunction prohibiting Gasco from soliciting Oahu's customers while they were under contract to Oahu.

The record indicates several uncontroverted facts relating to the relevant market and market shares of Gasco and Oahu Gas. Before Oahu began business in 1972, Gasco served 100% of the propane market on Oahu and in the "outer islands." After Oahu Gas began operating, Gasco's share of

the market on Oahu declined steadily. By 1983, before the trial, Oahu sold about 30% of the propane in Oahu. Oahu Gas dominated sales to high-volume commercial and industrial users on Oahu, supplying 78% of that sub-market in 1985. Gasco supplied about 20% of those customers; Aloha Gas supplied the remaining 2%. Oahu Gas did not sell propane in the outer islands.

Oahu's claims of monopolization and attempted monopolization went to trial in 1985. The jury returned a verdict in favor of Oahu and found treble damages of $4,963,998.00. The court also awarded attorneys fees of $873,324.00.

DISCUSSION

1. *Monopoly Power in the Relevant Market*

[1] The offense of monopolization under Section 2 of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *see also Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1347 (9th Cir. 1986) (making explicit as a third factor the implicit requirement of "causal antitrust injury"). The jury found that Gasco had monopoly power in the relevant market from 1972 to 1982, when its alleged exclusionary conduct took place. Because Pacific Resources is appealing from the denial of a motion for judgment notwithstanding the verdict, we review the evidence on this factual issue in the light most favorable to Oahu and draw all reasonable inferences in Oahu's favor. *Peterson v. Kennedy*, 771 F.2d 1244, 1252 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1642 (1986); *see also Forro Precision, Inc. v. IBM Corp.*, 673 F.2d 1045, 1058 (9th Cir. 1982) (describing the standard of review for a motion to direct verdict, which is the same as the standard for JNOV). "A JNOV is

improper if reasonable minds could differ over the verdict." *Peterson*, 771 F.2d at 1252.

There is no question that Gasco, a subsidiary of Pacific Resources, distributed 100% of Hawaii's propane in 1972, before Oahu Gas entered the market. Gasco is still the only supplier of propane on the outer islands. Pacific Resources contends, however, that the decline of Gasco's market share after Oahu entered the market and Aloha's entry into the market show that Gasco did not have monopoly power. Pacific Resources also contends that the relevant market consists of large-scale consumers of propane on Oahu, rather than the whole propane market. If so, Oahu Gas actually has a much larger share of that "submarket" by 1985 than did Gasco.

Determining the relevant market typically requires an inquiry into the nature of the product, *see, e.g., United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956), and the geographical area of effective competition. *United States v. Grinnell*, 384 U.S. at 575-76. Determining the existence of monopoly power in the particular market usually depends on market share and barriers to entry, but the inquiry focuses more generally on the power to "control prices or exclude competition." *U.S. v. duPont*, 351 U.S. at 391. The factors to consider may vary from case to case, so no one factor is determinative: "Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine advers effects on competition, 'proof of actual detrimental effects, such as reduction of output' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effect.' " *F.T.C. v. Indiana Federation of Dentists*, 106 S. Ct. 2009, 2019 (1986).

[2] The jury's finding that Gasco had monopoly power in the whole Hawaiian propane market is consistent with the Court's view that monopoly power involves "the potential for

genuine adverse effects on competition." That Gasco completely dominates Hawaii's outer islands is evidence supporting the jury's finding of monopoly power. Evidence about the difficulty of entry to the propane market also supports the jury's finding. The jury could reasonably have concluded that Oahu's success in capturing a significant market share on Oahu may have been due to the "insider" status of its founder, once an executive with Gasco, who took some large accounts with him when he left Gasco. The only other new entrant to the market, Aloha Gas, has remained very small. Viewing all this evidence in the light most favorable to Oahu, we hold that the jury could reasonably conclude that Gasco had monopoly power in the relevant market.[1]

2. *The Decision Not to Expand the Refinery*

The second element of monopolization under Section 2 of the Sherman Act is "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell*, 384 U.S. at 570-71; *see also Catlin v. Washington Energy*, 791 F.2d at 1347. The jury was asked to determine whether legitimate business reasons or anticompetitive, exclusionary motives lay behind Pacific Resources' 1972 decision not to modify its Hawaiian refinery to permit propane production. Whether specific conduct is anticompetitive under the Sherman Act is a question of law that we review *de novo*. *Western Concrete Structures Co. v. Mitsui & Company (U.S.A.), Inc.*, 760 F.2d 1013, 1016 (9th Cir.), *cert. denied*, 474 U.S. 903 (1985).

[3] The factual questions about Pacific Resources' allegedly exclusionary conduct in the early 70s were resolved at trial. It was clear that expanding the refinery to permit propane pro-

[1] Because we uphold the jury's finding of monopoly power, we need not consider the attempted monopolization claim that was an alternative ground for the jury's verdict.

duction would have been uneconomical under federal price controls in place at the time. It was also clear, however, that the decision not to produce propane had been based not only on economic factors but also on a desire to restrict the supply of propane potentially available to Oahu Gas. There is evidence in the record that the management of Pacific Resources feared that increasing the supply of propane in Hawaii would result in Oahu's getting more propane to sell, increasing its market share.

The desire to maintain or increase one's market share is not in itself an antitrust violation, of course. Nor is a decision to forego the production of propane an illegal act *per se*. But a monopolist must take care that otherwise lawful acts do not have anticompetitive effects because of its monopoly power.

We therefore reject Pacific Resources' broad contention that the antitrust laws may never impose duties on a monopolist to aid its competitors. Because of a monopolist's special position the antitrust laws impose what may be characterized as affirmative duties.[2] These duties are not absolute, however; they arise only when there is no justification for refusing to aid a competitor.

[4] Where a monopolist's refusal to aid a competitor is based partially on a desire to restrict competition, we determine antitrust liability by asking whether there was a legitimate business justification for the monopolist's conduct. *See Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585 (1985); *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1478 (9th Cir. 1986); *Drinkwine v. Federated Publications, Inc.*, 780 F.2d 735, 740 (9th Cir.), *cert. denied*, 106 S. Ct. 1471 (1986).

[2] For example, a ski resort with monopoly power was required to continue a marketing arrangement with its small neighbor where there was no legitimate business justification for discontinuing it, and the arrangement increased competition and benefited consumers. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

[5] The investment required of Pacific Resources to produce propane would have resulted in a negative return. In light of the then-existing price controls, it was not economically efficient for Pacific Resources to invest its resources in propane production. The decision to forego propane production did not exclude competition unnecessarily. The economic rationale, even if not the only rationale for the decision, excluded competition necessarily. Economic necessity distinguished this conduct from "willful acquisition or maintenance of [monopoly] power," *United States v. Grinnell*, 384 U.S. at 570-71, because it involved the 'business acumen' that *Grinnell* specifically exempts from antitrust liability. *Id.*

The jury was instructed improperly. It was given an either/or choice: it could decide whether Pacific Resources' decision was based on economic motives *or* on a desire to maintain its market share.[3] It should have been instructed that the desire to maintain market power — even a monopolist's market power — cannot create antitrust liability if there was a legitimate business justification for refusing to produce propane.

Two lines of cases support our holding, though they are not directly controlling. A line of "product innovation" cases has consistently rejected antitrust liability for a monopolist's decision about when or whether to market new products. *See, e.g., Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d

[3] The jury instruction on this issue was:

> To sum up, you must determine whether PRI and Gasco maintained monopoly power in a relevant market by policies and conduct which were not legitimate business decisions but were instead designed primarily to further any domination of a relevant market. . . .
>
> You should seek to determine if the challenged conduct is supported by legitimate business reasons *or* whether it was a deliberate effort to injure a smaller rival which caused defendants to sacrifice short-run benefits and consumer good will.

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534, 545 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984); *California Computer Products v. I.B.M. Corp.*, 613 F.2d 727 (9th Cir. 1979); *see also GAF Corporation v. Eastman Kodak Co.*, 519 F. Supp. 1203, 1232 (S.D.N.Y. 1981) ("[N]o court has yet found a monopolist's failure to market a product as satisfying § 2's conduct requirement.").

These cases, involving technological innovations, have held that the contested marketing decisions derived from "a superior product", and are therefore exempt from antitrust liability. Oahu Gas contends that such cases are inapposite, because the product at issue here is propane, hardly an innovation. But business acumen — the economics of timing a technological innovation — is also an aspect of these cases.

In *California Computer* we addressed specifically the issue of when a question of legitimate business purpose may go to a jury. Where IBM redesigned products in such a way that they were incompatible with a competitor's product, and where such design changes were justified "by reason of lower manufacturing cost and price or improved performance[,] . . . [t]he reasonableness of IBM's conduct . . . did not present a jury issue." *California Computer Products*, 613 F.2d at 744.

Another line of cases that Oahu asks us to consider are "supply restriction" cases. It contends that Pacific Resources impermissibly sought to restrict the supply of propane in the Hawaiian Islands. *See, e.g., NCAA v. Board of Regents*, 468 U.S. 85 (1984); *Litton Systems, Inc. v. AT&T*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976). A theory of liability based on "supply restriction" must fail because Pacific Resources had no monopoly power over supplies of propane to Hawaii. Chevron produced all Hawaiian propane until 1982.[4] Contrary to Oahu's argument, the regu-

[4]For this reason the "essential facilities" theory would not apply either. *See MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) (plaintiff must show control of the essential facility by a monopolist).

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latory scheme in place in the 70s did not give Pacific Resources control over propane supplies. Oahu appealed to the Department of Energy for larger allocations of propane, and it was ultimately successful. Oahu's supply restriction theory cannot support antitrust liability for Pacific Resources' decision not to produce propane.

As a matter of law, we reverse the judgment of antitrust liability based on the refinery episode. Pacific Resources' decision to refrain from producing propane because it was not economically efficient is sufficient justification to preclude antitrust liability.

3. *Gasco's 1982 Marketing Campaign*

The jury found that Gasco's 1982 campaign to offer cut-rate contracts to large propane purchasers was anticompetitive and predatory. Pacific Resources contends that Gasco "had the absolute right to offer reduced prices so long as those offers were not shown to be below costs or shown to be predatory by clear and convincing evidence." Oahu, on the other hand, maintains that Pacific's "efforts to fit their 'blitzkrieg' conduct into a predatory pricing mold must be rejected," because Gasco "made false 'offers' without ever intending to compete for that business."

In reviewing this denial of a motion for a judgment notwithstanding the verdict, we must take the factual evidence in the light most favorable to Oahu and draw all reasonable inferences in Oahu's favor. *See Peterson v. Kennedy*, 771 F.2d at 1252. "A JNOV is improper if reasonable minds could differ over the verdict." *Id.*

[6] Applying these guidelines to the jury's findings, we conclude that the court was justified in denying the JNOV motion. Pacific's argument that the evidence could not reasonably support a claim for predatory pricing, though accurate, is misplaced. This is not a predatory pricing case. The

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evidence relevant to the finding of predatory conduct in this case is not the prices Gasco offered. It is the contracts themselves and the testimony about how those contracts were offered to customers of Gasco and Oahu. In the case of predatory pricing, a monopolist is willing to risk losses in the short-run to eliminate a competitor. In this case, however, the jury may be presumed to have accepted Oahu's claim that Gasco was not taking such a risk because the cut-rate contracts it offered were "shams."

Under Section 2 of the Sherman Act, any conduct that "is not true competition" and "makes sense only because it eliminates competition" is forbidden. If conduct by a monopolist "does not enhance the quality of attractiveness of the product, reduce its cost, or alter the demand function that all competitors confront," and is driven by a purpose "to create a monopoly by means other than fair competition," it violates section two. *William Inglis, Etc. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1030-31 (9th Cir. 1981); *see* 3 P. Areeda & D. Turner, Antitrust Law ¶ 738a (1978). Fraudulent offers of cut-rate prices whose only rationale is a desire to drive rivals out of the market is exclusionary conduct within this definition.

Our review of the record convinces us that the evidence reasonably supported the jury's finding of a predatory rationale in the 1982 marketing campaign. Most of the Oahu Gas customers solicited by Gasco were known to have had long-term contracts with Oahu that they would be unlikely to break. A Gasco employee testified that when making the offer to an Oahu customer, she invited the customer to ask Oahu to meet or beat the offered price cut. The jury may also be presumed to have found credible Oahu's evidence that Gasco did not make the same offers to its own customers as it did to Oahu's customers.

On this record, the trial court's denial of the JNOV was not improper. We affirm that portion of the judgment based on

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the jury's finding that Gasco's marketing campaign in 1982 was anticompetitive and predatory under Section 2 of the Sherman Act.

4. *Damages*

Because we partially reverse the judgment, the district court, on remand, must strike the damages based on the refinery episode. As for the damages based on the 1982 marketing campaign, we must affirm that portion of the award unless it is clearly unsupported by the evidence. *Chalmers v. City of Los Angeles*, 762 F.2d 753, 760 (9th Cir. 1985); *see also, Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 836 (9th Cir. 1982) ("[A]n antitrust plaintiff is only obligated to provide the trier-of-fact with some basis from which to estimate reasonably, and without undue speculation, the damages flowing from the antitrust violations.").

Damages flowing from the 1982 marketing campaign were fixed at $421,481.00, before trebling. This was the amount Oahu lost due to the reduced prices it gave from April 30, 1982, through November 30, 1983, to those customers who were solicited for cut-rate contracts by Gasco. Pacific Resources contends that its actions did not cause Oahu's losses. It argues that with the June 1982 injunction against Gasco's campaign, Oahu need not have kept its prices lowered. Any losses from reduced prices after June 30, 1982, were therefore voluntary. Whether Oahu was able to raise its prices again immediately after the injunction is an issue of fact that the jury resolved against Pacific Resources. We do not find this conclusion clearly erroneous and therefore affirm the amount of damages based on the marketing campaign.

Because our partial reversal will reduce the overall damage award, the district court on remand must also recalculate the amount of the award for attorney's fees.

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Affirmed in part, reversed in part, and remanded for adjustment of damages and attorney's fees in accordance with this opinion

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OAHU GAS SERVICE, INC. v. PACIFIC RESOURCES INC.

CITE AS: 838 F.2d 360 (9th Cir. 1988)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OAHU GAS SERVICE, INC.,
Plaintiff-Appellee,

v.

PACIFIC RESOURCES INC., GASCO, INC.,
Defendants-Appellants.

No. 86-2250

D.C. No. CV-77-0444-PGR

ORDER AND OPINION

Appeal from the United States District Court
for the District of Hawaii
Paul G. Rosenblatt, District Judge, Presiding

Argued and Submitted
August 10, 1987—San Francisco, California

Order and Opinion Filed February 1, 1988

Before: Eugene A. Wright, Jerome Farris and David R. Thompson, Circuit Judges.

Opinion by Judge Farris

SUMMARY

Antitrust

Appeal from judgment. Reversed.

The court's opinion filed October 9, 1987, and amended November 27, 1987 is withdrawn. Appellant Pacific Resources appeals the denial of its motion for j.n.o.v. Appel-

lant Gasco was the sole retail seller of propane gas in Hawaii. It received virtually all its propane from Chevron, which operated the only propane refinery in Hawaii. Appellee Oahu Gas began selling propane on Oahu. Its propane supplies also came from Chevron. In 1973 the federal government controlled the price and allocation of propane. Oahu had to apply for a base period volume of propane that Chevron would be required to supply. During the energy crisis Gasco bought increasing amounts of propane from foreign suppliers. During these years, Oahu Gas repeatedly applied for larger allocations of propane. Gasco opposed these applications because giving Oahu more low-cost domestic propane would require Gasco to buy more expensive foreign propane. In 1979, Oahu's share of domestic propane was increased on the condition that Oahu pay Gasco to offset some of Gasco's additional costs for importing more foreign propane. One basis for Oahu's Sherman Act allegations was the decision of Hawaiian Independent Refinery, Inc., a subsidiary of Pacific Resources, not to produce propane in the 1970s. Another basis for Oahu's allegations was Gasco's marketing program in 1982. Before Oahu began business in 1972, Gasco served 100% of the propane market on Oahu and in the outer islands. After Oahu Gas began operating, Gasco's share declined steadily. Oahu Gas dominated sales to high-volume commercial and industrial users on Oahu. Oahu Gas did not sell propane in the outer islands. Oahu's claims of monopolization and attempted monopolization went to trial. The jury returned a verdict in favor of Oahu.

[1] The first element of the offense of monopolization is the possession of monopoly power in the relevant market. [2] In this determination of the relevant market, the court focused on product definition first. [3] Three plausible product markets were suggested by the parties as the proper subjects of focus for purposes of this court's antitrust inquiry. [4] If the evidence was sufficient to allow a reasonable jury to define the relevant market for antitrust purposes in terms of propane distribution in Hawaii, this court is required to accept the

jury's factfinding on this issue. [5] Unfortunately, review of the evidence does not shed light on the proper market definition. The jury did hear testimony from Oahu's expert, Dr. Meier. Dr. Meier may have opened the door inadvertently to a logical inference in favor of a narrow market definition. [6] This narrow definition also finds support in other materials relied upon by Oahu. [7] Viewing the evidence from this perspective, the jury acted reasonably in concluding that the relevant market included commercial and residential propane, but not other sources of energy. [8] As to geography, based on the evidence, the jury could reasonably have defined the geographical market for propane to include the outer islands. Thus, the jury's definition of the geographical market to include all of Hawaii is affirmed. [9] The jury found that Gasco possessed monopoly power. Oahu maintains that Gasco's high market share and lack of evidence of meaningful entry by other firms into the Hawaiian propane market support an inference of monopoly power. Gasco maintains that the evidence of its steadily declining market share combined with the absence of evidence of barriers to entry or an ability on Gasco's part to control prices precludes any finding that it possessed monopoly power. [10] Inquiries into the existence of monopoly power focus generally on a firm's ability to control prices or exclude competition. Inquiries in this area often depend upon market share and barriers to entry. [11] Gasco argues that the entry of Oahu and Aloha demonstrated that Gasco lacked the ability to control prices or to exclude new entrants. [12] The evidence supports the conclusion that high barriers to entry existed in the Hawaiian propane market. [13] The second element of monopolization is the willful acquisition or maintenance of monopoly power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. [14] A monopolist must take care that otherwise lawful acts do not have anticompetitive effects because of its monopoly power. [15] This court therefore rejects Pacific Resources' contention that the antitrust laws may never impose duties on a monopo-

list to aid its competitors. These duties arise only when there is no justification for refusing to aid a competitor. [16] Where a monopolist's refusal to aid a competitor is based partially on a desire to restrict competition, antitrust liability is determined by asking whether there was a legitimate business justification for the monopolist's conduct. [17] The decision to forego propane production did not exclude competition unnecessarily. Economic necessity distinguished this conduct from willful acquisition or maintenance of monopoly power. [18] The jury should have been instructed that the desire to maintain market power cannot create antitrust liability if there was a legitimate business justification for refusing to produce propane. [19] Oahu's theory of liability based on supply restrictions fails because Pacific Resources had no monopoly power over supplies of propane to Hawaii. [20] Thus, the judgment of antitrust liability based on the refinery episode is reversed. [21] The jury found that Gasco's offer of cut-rate contracts to large propane purchasers was anticompetitive and predatory. [22] Oahu's claim is that the insincerity or sham nature of Gasco's offers is sufficient to support a finding of predatory conduct. [23] Testimony provides support for an inference that Gasco's true goal was not to attract customers but to cut into Oahu's profits. [24] This sham offer campaign seems to have increased competition in the market by inducing Oahu to lower its prices. [25] A finding of anticompetitive intent will not sustain a Section 2 claim in the face of evidence of procompetitive effects. [26] This analysis should not be taken as an endorsement of Gasco's conduct. [27] Thus the jury's finding of antitrust liability growing out of Gasco's 1982 marketing campaign is reversed.

COUNSEL

William S. Boyd, Brobeck, Phleger & Harrison, San Francisco, California, for the defendants-appellants.

Maxwell Blecher, Blecher, Collins & Weinstein, Los Angeles, California, for the plaintiff-appellee.

ORDER

The Opinion filed October 9, 1987 and amended November 27, 1987 is withdrawn.

OPINION

FARRIS, Circuit Judge:

Oahu Gas Services, Inc., sued Pacific Resources, Inc., under Section 2 of the Sherman Act for monopolization and attempted monopolization of propane sales in Hawaii. Oahu Gas alleged that Pacific Resources' unlawful conduct included: (1) a decision in 1974 not to begin producing propane and (2) a campaign in 1982 to force Oahu to lower prices by offering sham cut-rate contracts to Oahu's customers. After trial, a jury found in favor of Oahu and awarded treble damages of $4,963,998.00. Pacific Resources appeals the denial of its motion for judgment notwithstanding the verdict.

BACKGROUND

Until 1972, Gasco, a subsidiary of Pacific Resources, was the sole retail seller of propane gas in Hawaii. It received virtually all its propane from Chevron, which operated the only propane refinery in Hawaii. In 1972, Oahu Gas Service was formed and began selling propane on Oahu. Its propane supplies also came from Chevron. Beginning in 1973, the federal government controlled the price and allocation of propane. The base period for determining allocations was May 1972, before Oahu Gas had begun business. Oahu therefore had to

apply to the Department of Energy for a "base period volume" of propane that Chevron would be required to supply.

During the energy crisis, price controls on domestically produced propane led Chevron to produce the minimum required by the Department of Energy. Gasco bought increasing amounts of propane from foreign suppliers. During these years, Oahu Gas repeatedly applied to the Department of Energy for larger allocations of propane. Gasco opposed these applications because giving Oahu more low-cost domestic propane would require Gasco to buy more expensive foreign propane, thus increasing Oahu's cost advantage. The Department of Energy denied Oahu's requests until, in July 1979, the Department increased Oahu's share of domestic propane on the condition that Oahu pay Gasco $163,108.00 to offset some of Gasco's additional costs for importing more foreign propane.

One basis for Oahu's Sherman Act allegations was the decision of Hawaiian Independent Refinery, Inc. — a subsidiary of Pacific Resources — not to produce propane in the 1970s. Hawaiian Independent Refinery began operating a petroleum refinery in 1972, producing chiefly military fuels. In early 1973, before price controls went into effect, Hawaiian planned to modify its refinery to permit production of propane and gasoline. The plans assumed that the modifications could be completed by 1976 and that Gasco would be the chief customer for propane. Under price controls, however, Hawaiian's propane would have had the same ceiling price as Chevron's. Thus the refinery expanded only to permit gasoline production, which began in May 1975. After price controls ended in 1981, the refinery was modified to produce propane. It has sold propane to Gasco and to Aloha Gas, a small new propane distributor. It has expressed a willingness to sell propane to Oahu Gas.

Another basis for Oahu's allegations was Gasco's marketing program in 1982. During the energy crisis, demand for

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propane fell as consumers turned to alternative energy sources. With the end of regulation in 1981 and the beginning of propane production at Hawaiian's refinery in 1982, propane supplies became more plentiful. Gasco began a marketing program in 1982 that included offers of low-cost long-term contracts to large-volume purchasers, both its own customers and customers served by Oahu Gas. The prices offered were above Gasco's average total cost of supplying propane, but Oahu asserted at trial that the offers were "shams," designed to force Oahu to cut prices to its own customers. Oahu did cut prices to those customers, resulting in such low profits, Oahu claims, that it was nearly put out of business. None of Oahu's customers accepted Gasco's offers. Several of Gasco's own customers accepted the offers. In June 1982, Oahu sought and obtained an injunction prohibiting Gasco from soliciting Oahu's customers while they were under contract to Oahu.

The record indicates several uncontroverted facts relating to the relevant market and market shares of Gasco and Oahu Gas. Before Oahu began business in 1972, Gasco served 100% of the propane market on Oahu and in the "outer islands." After Oahu Gas began operating, Gasco's share of the market on Oahu declined steadily. By 1983, before the trial, Oahu sold about 30% of the propane in Oahu. Oahu Gas dominated sales to high-volume commercial and industrial users on Oahu, supplying 78% of that sub-market in 1985. Gasco supplied about 20% of those customers; Aloha Gas supplied the remaining 2%. Oahu Gas did not sell propane in the outer islands.

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DISCUSSION

1. *Monopoly Power in the Relevant Market*

[1] The offense of monopolization under Section 2 of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *see also Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1347 (9th Cir. 1986) (making explicit as a third factor the implicit requirement of "causal antitrust injury"). We review first the jury's finding that Gasco possessed monopoly power in the Hawaiian propane market from 1972 to 1983, the relevant period for purposes of Oahu's allegations of exclusionary conduct. Our previous decisions establish that both market definition and market power are essentially questions of fact. *See, e.g., Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291, 1299 (9th Cir. 1982) ("The definition of the relevant market is basically a fact question dependent upon the special characteristics of the industry involved . . ."); *Greyhound Computer Corp. v. International Business Machines Corp.*, 559 F.2d 488, 496-97 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (reviewing the jury's finding of monopoly power for sufficiency of the evidence). We thus review the evidence on these factual issues in the light most favorable to Oahu and draw all reasonable inferences in its favor, for this is an appeal from the denial of a motion for judgment notwithstanding the verdict. *See Peterson v. Kennedy*, 772 F.2d 1244, 1252 (9th Cir. 1985), *cert. denied*, _ U.S. _, 106 S. Ct. 1642 (1986) ("A JNOV is improper if reasonable minds could differ over the verdict").

A. *Market Definition*

[2] A determination of the relevant market typically requires an inquiry into the nature of the product, *see, e.g.*,

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United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 391 (1956), and the geographical area of effective competition. *United States v. Grinnell*, 384 U.S. at 575-76. Although product definition and geographical definition are theoretically separable inquiries, in this case they are intimately intertwined. Oahu asks us to affirm the jury's finding that the relevant market was inclusive of all propane sales in Hawaii. Gasco, on the other hand, argues that the relevant market was limited to high-volume industrial and commercial users of propane. These high volume users, the evidence suggested, were located either primarily or exclusively in Oahu. The arguments made at trial and pressed before us, though not extensive on the issue of market definition, make clear that the crux of the parties' dispute is product definition rather than geographical definition. We thus focus on product definition first, keeping in mind the importance of delineating the geographical market as well for its bearing on Gasco's market power.

[3] The issue of product definition, though always an inexact science often requiring distinctions in degree rather than kind, *see* 2 P. Areeda & D. Turner, Antitrust Law ¶ 518 (1978), is especially complicated in this case. During the course of the litigation, three plausible product markets have been suggested by the parties as the proper subjects of focus for purposes of our antitrust inquiry. On the broad end of the scale, it was suggested by Gasco at trial and in its motions before the district court, though not before us, that the jury erred by failing to include in its product definition numerous alternative energy sources that were said to constrain significantly any potential control over prices or competition in the propane market. A second possible delineation of the product market, the one with an intuitive if not necessarily a strong economic appeal, is all propane distribution in Hawaii; this is the market definition that the jury adopted. A third approach, first suggested by Gasco before the district court in its brief in support of its motion for a new trial and renewed on appeal, would be to define the relevant market in a relatively narrow

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fashion, limiting it to high-volume commercial and industrial users of propane.

[4] Our review is limited, of course, to an assessment of the evidence in the light most favorable to Oahu. Thus, if the evidence was sufficient to allow a reasonable jury to define the relevant market for antitrust purposes in terms of propane distribution in Hawaii, we are required to accept the jury's fact-finding on this issue. *See Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381, 1392 (9th Cir.), *cert. denied sub nom. National Football League v. Oakland Raiders, Ltd.*, 469 U.S. 990 (1984).

[5] Unfortunately, a review of the evidence that was presented to the jury in this case does not shed considerable light on the proper market definition. The jury did hear testimony from Oahu's expert, Dr. Meier, to the effect that propane was the relevant market because conversion to alternative energy sources, such as electricity or heat pumps, would be too expensive for many propane users. This argument was made, of course, in response to Gasco's contention that the product market should have been defined *more* broadly than just propane, and we must view it in that light. It is clear from Dr. Meier's testimony, however, that his impression of the constraints upon cross-elasticity of demand was more applicable to small residential users of propane than to high volume commercial buyers. Arguably, in responding to the argument for a broader product market, Dr. Meier may be said to have opened the door inadvertently to a logical inference in favor of a narrow market definition.

[6] This narrow definition also finds support in other materials relied upon by Oahu. In its memorandum before the district court in opposition to Gasco's motion to set aside the verdict, Oahu made much of the testimony of Howard Lee that "once a house is gassed, it's gassed, probably for ten, twenty, thirty years and to change it back to electricity, financially it's not practical." There was also the testimony of Lam-

bert Lui-Kwan, Oahu's Director of Sales, that Oahu did not want residential customers because it viewed their business as unprofitable, and that Oahu therefore referred inquiries about residential service to Gasco. As a result, Oahu Gas, by 1983, had come to dominate sales to high-volume commercial and industrial users on the island of Oahu but had no business among either residential users on Oahu or on the outer islands.

[7] Had Gasco reinforced this testimony regarding the differences between residential and commercial use of propane with further evidence of the constraints upon which residential and commercial suppliers operate, it is possible that a reasonable jury would have had no alternative but to conclude that high-volume industrial sales were the relevant market in this case. Gasco did not do this, however, preferring instead to focus at trial upon the theoretical interchangeability between propane and other energy sources. Gasco made no effort at trial to distinguish between residential and commercial use of propane. Consequently, the question submitted to the jury with regard to product definition was limited to its assessing the evidence of user substitutes and deciding whether alternative energy sources significantly impacted upon propane distribution. Viewing the evidence from this perspective and in the light most favorable to Oahu, we cannot say that the jury acted unreasonably in concluding that the relevant market included commercial and residential propane, but not other sources of energy such as electricity.

[8] As to geography, this segment of the inquiry into market definition is clearly subsidiary to product definition. No effort was ever made, for example, to differentiate between commercial and residential propane sales on the island of Oahu on the one hand and propane sales on all the islands on the other. This is partly because commercial sales on the outer islands are negligible and partly because Oahu Gas sold only to commercial users on the island of Oahu. In either case, we are convinced, in part because of some of Gasco's

own arguments, that the jury could reasonably have defined the geographical market for propane to include the outer islands. In contending that the ease of entry into the propane distribution business precluded its exercise of monopoly power, Gasco states, perhaps inadvertently: "The undisputed evidence surrounding [Oahu Gas]'s own entry into the propane business in 1972 demonstrated that [Pacific Resources] and Gasco had no power to exclude new entrants from selling propane *in Hawaii.*" (Emphasis added). Gasco presented no evidence to the jury, nor to us, regarding transportation costs to the outer islands or other barriers between the island of Oahu and its smaller compatriots. Accordingly, we affirm the jury's definition of the geographical market to include all of Hawaii.

Our conclusion that the jury acted reasonably in its market definition is made with some questions as to whether the correct result was reached. These reservations might ordinarily give us pause, especially since our affirmance leads inexorably to the conclusion that Gasco wielded considerable power in the relevant market. *See* Section IB, *infra*. However, as our discussion of the second part of the test for monopolization demonstrates below, a finding of monopoly power has no bearing in this case on liability. We are therefore content to assume *arguendo* the existence of monopoly power, as we have done in previous cases in which the other requirements for maintaining a Section 2 action were in doubt. *See, e.g., Transamerica Computer Co., Inc. v. International Business Machines Corp.*, 698 F.2d 1377, 1382 (9th Cir. 1983), *cert. denied*, 464 U.S. 955 (1983); *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 739 (9th Cir. 1979).

B. *Market Power*

[9] The jury found that Gasco possessed monopoly power in the Hawaiian propane market. Our review of that finding is limited again to an assessment of the evidence in the light

most favorable to Oahu. The evidence demonstrated that Gasco was the exclusive seller of propane to residential sellers on Oahu and on the outer islands. As a result of this dominance of certain parts of the market, Gasco's overall market share in the Hawaiian propane market was consistently above 68% from 1972 to 1983. The parties are essentially in agreement on the computations of Gasco's market share, which declined from a figure of 100% in 1972 to 95.5% in 1973, to 89.7% in 1974, to 69.6% in 1981, and finally to 68.2% in 1983. They disagree as to the legal conclusions that may be drawn from these statistics and other evidence. Oahu maintains that the evidence of Gasco's high market share and the lack of evidence of "meaningful entry" by other firms into the Hawaiian propane market from 1973 to 1984 support an inference of monopoly power. Gasco maintains that the evidence of its steadily declining market share during the relevant period, combined with what it contends is the absence of evidence in the record of barriers to entry or an ability on Gasco's part to control prices, precludes any finding that it possessed monopoly power.

[10] Inquiries into the existence of monopoly power focus generally on a firm's ability to "control prices or exclude competition." *Greyhound Computer*, 559 F.2d at 496 (quoting *United States v. duPont*, 351 U.S. at 391). Although no single factor has been held determinative as to the existence of such power, inquiries in this area often depend heavily upon market share and barriers to entry. *See Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986). A firm with a high market share may be able to exert market power in the short run, but "[s]ubstantial market power can persist only if there are significant and continuing barriers to entry." 2 Areeda & Turner, *supra*, at ¶ 505; *accord Cargill Inc. v. Monfort of Colorado*, _ U.S. _, 107 S. Ct. 484, 494 n.15 (1986).

Keeping these factors in mind and viewing the evidence most favorably to Oahu Gas, we now address the parties' con-

tentions. Oahu makes two arguments in support of the jury's finding of monopoly power. First, Oahu maintains that Gasco's high market share constitutes substantial evidence of monopoly power in spite of the evidence that that share constantly declined throughout the relevant period. Gasco argues, to the contrary, that the decline in its market share reflects an absence of monopoly power. Second, Oahu claims that the record, which reflects a virtual lack of entry by new firms into the Hawaiian propane market during the relevant time period, falls short of establishing the kind of competitive marketplace necessary to rebut the inference of monopoly power raised by Gasco's high market share. *See Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 925 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981).

If any conclusion may be gleaned from our prior decisions and those of the Supreme Court with regard to the first issue, it is that "market share is just the starting point for assessing market power." *Id.* A high market share, though it may ordinarily raise an inference of monopoly power, *see United States v. Grinnell*, 384 U.S. at 571, will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors. By the same token, "A declining market share may reflect an absence of market power, but it does not foreclose a finding of such power." *Greyhound Computer*, 559 F.2d at 496 n.18 (citations omitted). Applied to this case, these principles lead to the conclusion that provided the jury heard substantial evidence of Gasco's high market share throughout the relevant period, the decline in its market share could not preclude a finding of monopoly power as a matter of law. If, however, the sole basis for the jury's finding was Gasco's high market share, this finding could not stand up in the face of a showing of low entry barriers or other significant constraints on Gasco's power over the marketplace.

[11] Because the jury clearly heard substantial evidence relating to Gasco's market share, we proceed to the question

of entry barriers, which are in dispute. Oahu maintains that the lack of entry by competitors into the market is sufficient to support an inference of high entry barriers. Gasco argues that the entry of Oahu and Aloha demonstrated that Gasco lacked the ability to control prices or to exclude new entrants.

[12] We note preliminarily that both parties could theoretically be correct, if in fact Gasco lacked the power to exclude but there were external factors at work precluding entry into the market. In ordinary times, the failure of other firms to challenge Gasco on the outer islands and in the Oahu residential market might have supported an inference that Gasco had the power to exclude competitors or to control the price without much detailed inquiry. But because of the price controls that were in place from 1974 to 1981, Gasco clearly could not control the price and may not have had any control in the marketplace whatsoever. Thus, the question is whether Gasco could exclude rivals. In this regard, the jury learned of two entrants into the market from 1972 to 1984: Oahu and Aloha. Oahu entered the market in 1972 and consistently increased its market share thereafter, even during the period of price controls. Although this evidence of entry might tend to suggest that as of 1972, Gasco — which was dependent upon Chevron for propane supplies — could not exclude rivals, the jury also considered evidence that the founder of Oahu, once an executive with Gasco, took some large accounts with him when he left Gasco. This evidence supports an inference that Oahu's success may have owed not so much to its competition on the merits in an open market as to the "insider" status of its founder, and does not negate the inference of high entry barriers. The second entrant, Aloha Gas, did win some accounts, but the evidence that that firm remained very small could reasonably preclude a decision that Aloha's entry reflected a breakdown of barriers to entry. Viewed in the light most favorable to Oahu, therefore, the evidence reasonably supports the conclusion that high barriers to entry existed in the Hawaiian propane market throughout the relevant time period.

The ultimate focus of our inquiry, however, is Gasco's power, not barriers to entry. Oahu points to no further evidence of Gasco's ability to exclude competition, and Gasco's arguments regarding price controls go to its ability to control price, not to exclude competitors. Consequently, the question before us is whether the jury could reasonably have found that a firm with a consistently high, albeit declining, market share in a market with high barriers to entry possessed monopoly power. The answer is yes. "While market share is just the starting point for assessing market power, we think that market share, at least above some level, could support a finding of market power in the absence of contrary evidence." *Hunt*, 627 F.2d at 925. Clearly, Gasco had a high market share, and the record does not permit us to infer "contrary evidence" that would negate a finding of market power. Hence, we affirm the jury's finding that Gasco possessed monopoly power.[1]

II. ALLEGEDLY MONOPOLISTIC BEHAVIOR

[13] The second element of monopolization under Section 2 of the Sherman Act is "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell*, 384 U.S. at 570-71. The jury was asked to determine whether two courses of conduct by Gasco — a 1972 decision not to modify its refinery to permit propane production and a 1982 marketing campaign targeted at Oahu's clientele — constituted predation within the meaning of Section 2. The jury found in the affirmative on both counts. These determinations that specific conduct was anticompetitive in violation of the Sherman Act are questions of law that we review *de novo*. *Western Concrete Structures Co. v. Mitsui & Company*

[1]Because we uphold the jury's finding of monopoly power, we need not consider the attempted monopolization claim that was an alternative ground for the jury's verdict.

(U.S.A.), Inc., 760 F.2d 1013, 1016 (9th Cir.), *cert. denied*, 474 U.S. 903 (1985).

A. *The Decision Not to Expand the Refinery*

The factual questions about Pacific Resources' allegedly exclusionary conduct in the early 70s were resolved at trial. It was clear that expanding the refinery to permit propane production would have been uneconomical under federal price controls in place at the time. It was also clear, however, that the decision not to produce propane had been based not only on economic factors but also on a desire to restrict the supply of propane potentially available to Oahu Gas. There is evidence in the record that the management of Pacific Resources feared that increasing the supply of propane in Hawaii would result in Oahu's getting more propane to sell, increasing its market share.

[14] The desire to maintain or increase one's market share is not in itself an antitrust violation, of course. Nor is a decision to forego the production of propane an illegal act *per se*. But a monopolist must take care that otherwise lawful acts do not have anticompetitive effects because of its monopoly power.

[15] We therefore reject Pacific Resources' broad contention that the antitrust laws may never impose duties on a monopolist to aid its competitors. Because of a monopolist's special position the antitrust laws impose what may be characterized as affirmative duties.[2] These duties are not absolute, however; they arise only when there is no justification for refusing to aid a competitor.

[2]For example, a ski resort with monopoly power was required to continue a marketing arrangement with its small neighbor where there was no legitimate business justification for discontinuing it, and the arrangement increased competition and benefited consumers. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

[16] Where a monopolist's refusal to aid a competitor is based partially on a desire to restrict competition, we determine antitrust liability by asking whether there was a legitimate business justification for the monopolist's conduct. *See Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585 (1985); *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1478 (9th Cir. 1986); *Drinkwine v. Federated Publications, Inc.*, 780 F.2d 735, 740 (9th Cir.), *cert. denied*, 106 S. Ct. 1471 (1986).

[17] The investment required of Pacific Resources to produce propane would have resulted in a negative return. In light of the then-existing price controls, it was not economically efficient for Pacific Resources to invest its resources in propane production. The decision to forego propane production did not exclude competition unnecessarily. The economic rationale, even if not the only rationale for the decision, excluded competition necessarily. Economic necessity distinguished this conduct from "willful acquisition or maintenance of [monopoly] power," *United States v. Grinnell*, 384 U.S. at 570-71, because it involved the 'business acumen' that *Grinnell* specifically exempts from antitrust liability. *Id.*

[18] The jury was instructed improperly. It was given an either/or choice: it could decide whether Pacific Resources' decision was based on economic motives *or* on a desire to maintain its market share.[3] It should have been instructed

[3]The jury instruction on this issue was:

> To sum up, you must determine whether PRI and Gasco maintained monopoly power in a relevant market by policies and conduct which were not legitimate business decisions but were instead designed primarily to further any domination of a relevant market. . . .
>
> You should seek to determine if the challenged conduct is supported by legitimate business reasons or whether it was a deliberate effort to injure a smaller rival which caused defendants to sacrifice short-run benefits and consumer good will.

that the desire to maintain market power — even a monopolist's market power — cannot create antitrust liability if there was a legitimate business justification for refusing to produce propane.

Two lines of cases support our holding, though they are not directly controlling. A line of "product innovation" cases has consistently rejected antitrust liability for a monopolist's decision about when or whether to market new products. *See, e.g., Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 545 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984); *California Computer Products v. I.B.M. Corp.*, 613 F.2d 727 (9th Cir. 1979); *see also GAF Corporation v. Eastman Kodak Co.*, 519 F. Supp. 1203, 1232 (S.D.N.Y. 1981) ("[N]o court has yet found a monopolist's failure to market a product as satisfying § 2's conduct requirement.").

These cases, involving technological innovations, have held that the contested marketing decisions derived from "a superior product", and are therefore exempt from antitrust liability. Oahu Gas contends that such cases are inapposite, because the product at issue here is propane, hardly an innovation. But business acumen — the economics of timing a technological innovation — is also an aspect of these cases.

In *California Computer* we addressed specifically the issue of when a question of legitimate business purpose may go to a jury. Where IBM redesigned products in such a way that they were incompatible with a competitor's product, and where such design changes were justified "by reason of lower manufacturing cost and price or improved performance[,] . . . [t]he reasonableness of IBM's conduct . . . did not present a jury issue." *California Computer Products*, 613 F.2d at 744.

[19] Another line of cases that Oahu asks us to consider are "supply restriction" cases. It contends that Pacific Resources impermissibly sought to restrict the supply of propane in the Hawaiian Islands. *See, e.g., NCAA v. Board of Regents*, 468

U.S. 85 (1984); *Litton Systems, Inc. v. AT&T*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976). A theory of liability based on "supply restriction" must fail because Pacific Resources had no monopoly power over supplies of propane to Hawaii. Chevron produced all Hawaiian propane until 1982.[4] Contrary to Oahu's argument, the regulatory scheme in place in the 70s did not give Pacific Resources control over propane supplies. Oahu appealed to the Department of Energy for larger allocations of propane, and it was ultimately successful. Oahu's supply restriction theory cannot support antitrust liability for Pacific Resources' decision not to produce propane.

[20] As a matter of law, we reverse the judgment of antitrust liability based on the refinery episode. Pacific Resources' decision to refrain from producing propane because it was not economically efficient is sufficient justification to preclude antitrust liability.

B. *Gasco's 1982 Marketing Campaign*

[21] The jury found that Gasco's 1982 campaign to offer cut-rate contracts to large propane purchasers was anticompetitive and predatory. Oahu defends this result on the ground that Gasco "made false 'offers' without ever intending to compete for that business." Gasco disputes the finding of predatory conduct, arguing that it "had the absolute right to offer reduced prices so long as those offers were not shown to be below costs or shown to be predatory by clear and convincing evidence."

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[4] For this reason the "essential facilities" theory would not apply either. *See MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) (plaintiff must show control of the essential facility by a monopolist).

[22] The parties' legal dispute may be summarized as follows. Neither party argues that Gasco set prices below its costs for the purposes of alluring Oahu's customers. The allegation of exclusionary conduct is not founded, therefore, on a theory of predatory pricing. Rather, Oahu's claim is that the insincerity or "sham" nature of Gasco's offers is sufficient to support a finding of predatory conduct.

[23] The first question — whether the offers were "shams" — may be disposed of quickly. Reviewing the factual evidence in this appeal from a denial of a JNOV motion, we draw all reasonable inferences in Oahu's favor. The jury having returned a general verdict, we must presume it to have accepted Oahu's claim that Gasco's offer of cut-rate contracts were "shams." This finding was reasonably supported by the evidence. The jury heard evidence, for example, that most of the customers of Oahu Gas that Gasco solicited were known to have long-term contracts with Oahu that they would be unlikely to break. A Gasco employee testified, moreover, that when making an offer to an Oahu customer, she invited the customer to ask Oahu to meet or beat the offered price-cut. This testimony provides support for an inference that Gasco's true goal was not to attract customers, but to cut into Oahu's profits. Oahu also offered evidence, which we must presume the jury found credible, that Gasco did not make the same offers to its own customers as it did to Oahu's. This evidence, taken in full, is substantial enough to sustain Oahu's claim that Gasco's offer did not reflect a business risk on its part but only constituted a ploy to entice Oahu to lower *its* prices.

[24] The harder question is whether this "sham" offer violated Sherman Act Section 2. Although the evidence supports the jury's finding of a predatory intent underlying Gasco's marketing campaign, the net result of this campaign seems to have been to increase competition in the market by inducing Oahu to lower its prices. Thus, we have before us a situation

in which conduct with a predatory rationale had a procompetitive effect.

[25] In order to sustain the jury's finding of predation, we would have to turn our back on a large body of case law holding that "[t]he test of willful maintenance or acquisition of monopoly power is whether the acts complained of unreasonably restrict competition." *Drinkwine v. Federated Publication, Inc.*, 780 F.2d 735 (9th Cir. 1985), *cert. denied*, __ U.S. __, 106 S. Ct. 1471 (1986). Here, there was no restriction on competition, let alone an unreasonable restriction. To be sure, Gasco's intent is not irrelevant to the inquiry. *See id.* (citing *Aspen Skiing*, 472 U.S. at 602-03) ("Intent must also exist but is subsumed in an analysis of the exclusionary conduct"). But a finding of anticompetitive intent will not sustain a Section 2 claim in the face of evidence of procompetitive effects.

[26] This analysis should not be taken as an endorsement of Gasco's conduct. A campaign to harm or destroy rivals through deceptive marketing smacks of unfair competition, whose hallmark is harm to competitors. In seeking to induce Oahu's clients to abandon Oahu or to force Oahu to accept lower profits, Gasco engaged in activity that in some jurisdictions is actionable under the law of torts.

The goal of the antitrust laws, however, unlike that of business tort or unfair competition laws, is to safeguard general competitive conditions, rather than to protect specific competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). Professors Areeda and Turner, in their discussion of the antitrust liability of firms that engage in unfair competition, stated in a passage of particular relevance here:

> [W]hile it may be a tort for a defendant to induce another to deal in violation of his contract with the defendant's rival, it should not be an exclusionary practice. Buying an employee away from a rival, for

> example, does not impair competition any more when that employee was under a long term contract than when he was not. The competitive effect, if any, results from the transfer of resources or patronage away from the rival and to the monopolist. . . . If there is a tort, so be it. But antitrust law should not make liability depend upon the existence or non-existence of contracts which do not affect the competitive results.

3 P. Areeda & D. Turner, Antitrust Law ¶ 7381 (1978).

[27] We reverse the jury's finding of antitrust liability growing out of Gasco's 1982 marketing campaign. The undisputed evidence in the record that this campaign resulted in no anti-competitive effects precludes a finding of liability even though we accept the jury's conclusion that Gasco intended the campaign to harm Oahu and thereby to increase its market share.

CONCLUSION

We reverse the jury's findings of antitrust liability with respect to both the refinery decision and the marketing campaign. Consequently, we need not address the parties' respective contentions on the subject of damages.

REVERSED.

FILED
MAR 22 1988
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OAHU GAS SERVICE, INC., Plaintiff-Appellee, v. PACIFIC RESOURCES, INC.; GASCO, INC., Defendants-Appellants.	CA No. 86-2250 DC No. CV-77-0444-PGR (Hawaii) ORDER

Before: WRIGHT, FARRIS, and THOMPSON, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Farris and Thompson have voted to reject the suggestion for rehearing en banc and Judge Wright recommends rejection.

The full court has been advised of the suggestion for an en banc hearing and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

No. 86-2250
(USDC Hawaii: Civil No. 77-0444)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OAHU GAS SERVICE, INC.,
Plaintiff-Appellee,
vs.
PACIFIC RESOURCES INC., and GASCO INC.,
Petitioners, Defendants-Appellants.

PETITION FOR REHEARING WITH SUGGESTION OF REHEARING EN BANC

I. INTRODUCTION

Petitioners Pacific Resources Inc. ("PRI") and Gasco Inc. ("Gasco") hereby respectfully petition for reconsideration of the opinion filed October 9, 1987.

In this Section 2 Sherman Act suit involving retail distribution of propane in Hawaii, the trial court entered

judgment for treble damages in favor of plaintiff Oahu Gas Services, Inc. ("OGS"), against petitioners for, *inter alia*, offering reduced prices to high volume commercial propane purchasers on the Island of Oahu. The opinion affirms that portion of the judgment on the theory of unlawful monopolization by predatory pricing, even though it finds the evidence to be uncontroverted that the reduced prices offered by Gasco were above average total cost, that Gasco's share of the Oahu propane market had steadily declined after the entry of OGS in 1972, and that by 1985 OGS had captured 78% of the "sub-market" of high volume commercial and industrial propane customers (Slip Op. 5-6).[1]

The opinion concludes that there was clear and convincing evidence from which the jury could find that Gasco's offers of reduced prices were "shams" and thus had a "predatory rationale" (Slip Op 12-13) and that the jury could reasonably infer that Gasco had monopoly power in the relevant market because of a "potential for genuine adverse effects on competition" (Slip Op. 7-8). Yet, the opinion wholly fails to identify any evidence or theory supporting an inference of actual injury to competition arising from Gasco's offers of reduced prices or antitrust injury to plaintiff.

In the judgment of counsel filing this Petition, the opinion's holdings (1) that offers of price reductions above average total cost are predatory if "shams" in the sense that they were unlikely to be accepted and (2) that monopolization can be found in a market lacking significant barriers to entry or ability to control prices

[1] The opinion, which we attach as an Appendix, also reverses a major portion of the judgment relating to petitioners' decision not to invest in a refinery modification to produce propane during the period of government price controls.

conflict with other decisions of this Circuit in respects not addressed in the opinion. (3) the opinion also overlooks and fails to decide a material issue of law relating to post-injunction damages. In the interest of maintaining uniformity of this Court's decisions on issues of exceptional importance, en banc consideration is appropriate, we respectfully submit.

II. GROUNDS FOR PETITION

A. The Opinion's Predatory Pricing Holding Conflicts With The Prior Decisions Of This Circuit.

1. Price Reductions Above Average Total Cost Are Lawful In The Absence Of Clear And Convincing Evidence Of Injury To Competition.

The law of predatory pricing, as applied in this Circuit in *California Computer Products, Inc.* v. *International* Business Machines Corp, 613 F.2d 727 (9th Cir. 1979) and its progeny, is that prices above average total cost are lawful unless there is clear and convincing evidence of an injury to *competition*, *Drinkwine* v. *Federated Publications, Inc.*, 780 F.2d 735, 739 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 1471 (1986), and that an intent or "rationale" to injure a competitor is insufficient. *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1028 (9th Cir. 1981), *cert.* denied, 459 U.S. 825 (1982); *Airweld, Inc.*, v. *Airco, Inc.*, 742 F.2d 1184, 1192 (9th Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985).

The rule as applied to prices above average total costs was first stated in *Transamerica Computer Co.* v. *IBM*, 698 F.2d 1377, 1388 (9th Cir. 1983), *cert. denied*, 464 U.S. 955 (1983). The Court affirmed a judgment in favor of the defendant because the evidence did not show by clear and convincing evidence that it is "highly probably

true" that the defendant's pricing policy was predatory (*ibid*). In rejecting the district court's test of *per se* legality for prices above total average costs, the Court stated that such prices will "rarely" be predatory (*ibid.*) and hypothesized that "limit" pricing and temporary reductions designed to discourage new entrants could be shown to be exclusionary (*id.* at 1387). Subsequent cases, including *Drinkwine, supra* and *Airweld, supra,* make clear that to support a finding of predatory pricing there must be objective evidence of exclusionary conduct that injures competition other than an intent to injure a competitor. *See Olympia Equipment Leasing Co.* v. *Western Union & Tel. Co.,* 797 F.2d 370, 379 (7th Cir. 1986), *cert. denied,* 107 S.Ct. 1524 (1987).

2. The Opinion Fails To Find Any Injury To Competition.

The fatal flaw of the predatory pricing theory of the decision is that it assumes without discussion or analysis that a "sham" offer of reduced prices by Gasco could injure competition or cause antitrust damage to the plaintiff. Further, the opinion's discussion of the evidence fails to identify any acts by Gasco that remotely violate the Sherman Act.

After stating the competing contentions of the parties and referring to the concession that Gasco's reduced prices were above average total cost, the opinion states that plaintiff must prove by clear and convincing evidence that "defendant's pricing policy had a predatory rationale" (Slip Op. 12). The opinion then reasons that while in the "typical predatory pricing campaign", a monopolist is willing to risk short term "losses" to "eliminate" a competitor, here there was no risk to Gasco of such losses if the offers were "shams" (*ibid.*); further, the opinion holds that the jury may "be presumed to

have accepted" the claim that the offers were "shams", and there is evidence to support such a claim, to wit, (1) plaintiff's customers had long-term contracts with plaintiffs "that they would be unlikely to breach," (2) a Gasco employee "invited" the customer to ask plaintiff "to meet or beat" the offered price, and (3) Gasco did not make the "same offers" to its own customers that it made to plaintiff's customers (Slip Op. 13). The opinion's discussion of this issue then concludes with the assertion that "on this record" the trial court's "denial of the JNOV" was not improper (*ibid.*). What is missing from the foregoing discussion is any analysis or expanation of how any of the things described could injure competition or cause antitrust injury to the plaintiff.

That a typical monopolist will sustain short term losses to eliminate competitors is a theory that cannot support liability in this case. Gasco's offers, if accepted, would not result in losses to Gasco in the short run or otherwise: This follows necessarily from the undisputed fact that the offers were above average total cost. Hence, if the offers were genuine, they would not be illegal under traditional Section 2 analysis. If the offers were in fact "shams" in the sense that they could not have been accepted, they could have no economic effect, and there would be no occasion for OGS to reduce its prices to meet those offers.

Gasco's belief that plaintiff's customers would be "unlikely" to accept its offers of reduced prices, either because of prior contractual arrangements or expected price reductions by plaintiff, and its suggestions that the customers ask plaintiff to "meet or beat" the offers (Slip Op. 13) does not make the offers either sham or illegal under the Sherman Act. Indeed, offers of price

reductions with even the remote chance of gaining market share are the essence of competition:

> [T]he antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws. . . . To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for "it is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." *Arthur S. Langanderfer, Inc.* v. *S. E. Johnson Co.*, 729 F.2d 1050, 1057 (C.A. 6), *cert. denied*, 469 U.S. 1036 (1984).

Cargill, Inc. v. *Monfort of Colorado, Inc.*, ____ U.S. ____, 107 S.Ct. 484, 492. 2d 427 (1986). An offer of a reduced price that is procompetitive if accepted does not become anticompetitive if rejected.[2] The rationale of the opinion would necessarily chill above cost price reductions by a large competitor because of a concern that a smaller competitor will hold market share by reducing its prices and then recover treble damages because defendant's price reductions were unsuccessful in capturing market share.

---

[2] Neither does Section 2 of the Sherman Act require that the same offers be made to the customers of one's competitors as are made to its own customers. Thus, in *Drinkwine* v. *Federated Publications, Inc., supra*, 780 F.2d at 738-39, this Court held above cost price reductions made *only* to plaintiff's customers to be lawful. "Even if . . . [defendant] juggled its prices depending on competition, it is insufficient to show predatory conduct." (*Id.* at 739.)

On analysis, the opinion does not identify any evidence to support a finding that the offers could not be accepted and were thus sham. That Gasco thought it "unlikely" that they would be accepted does not mean they could not be. It was undisputed that the offers, if accepted, would have been legally binding on Gasco, that OGS in fact reduced its own prices as a competitive response and continued to sell propane at a profit and to increase its market share, and that Gasco's offers of reduced prices to some of its own customers were accepted. The opinion wholly ignores these obvious benefits to competition resulting from Gasco's offers and loses sight of the fundamental distinction, frequently noted by the prior opinions of this Circuit, that the Sherman Act is designed to protect "*competition, not competitors.*" *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 320 (1962).

In sum, the evidence discussed in the opinion falls far short of the kind of clear and convincing evidence that would permit a trier of fact to find predatory pricing or injury to competition when the prices were above average total cost.

B. The Opinion Fails To Decide The Legal Issues Of Market Definition And Monopoly Power.

The opinion mistakenly fails to determine as a matter of law whether or not on the undisputed evidence Gasco had monopoly power in a relevant market. Instead, the opinion finds that the jury could have determined that the "arrangement", *i.e.* Gasco's offers of competitive prices above its average total cost "has the potential for genuine adverse effects on competition" (Slip Op. 7-8). Because there is no evidence cited by the opinion that Gasco's offers injured competition, and the evidence is that the offers were beneficial to competition (*supra*,

p.6), the opinion erroneously fails to address the legal questions of market definition and market power.

The opinion asserts that Gasco's dominance of propane distribution in the "outer islands" is evidence supporting the jury's finding of "market power" (Slip Op. 8). The opinion thus betrays a confusion about relevant market and market power. The competition between OGS and Gasco is confined to Oahu, and Gasco's offers of reduced prices to OGS customers held to be predatory occurred only on Oahu. The only relevant geographic market or submarket is Oahu. And the opinion should have made that determination as a matter of law.

The opinion suggests that the "evidence about the difficulty of entry into the propane market" supports the jury's finding (Slip Op. 8). The undisputed evidence is that there are no significant barriers to entry. OGS and Aloha Gas have both entered and expanded their market shares. The opinion at this point wholly ignores the undisputed evidence, noted at the outset, that OGS has steadily increased its market share and that it "dominated" the "submarket" of large volume industrial and commercial customers to whom Gasco made its supposedly predatory offers (Slip Op. 6). The opinion's conclusion that there is a rational basis in the record to support a jury finding of monopoly power in a relevant market is thus fundamentally in conflict with the established law that monopoly power cannot exist in the absence of the power to exclude competitors or control prices. *United States* v. *Grinnell*, 384 U.S. 563, 571 (1966); *California Computer Corp.* v. *IBM*, *supra*, 613 F.2d at 735.

C. The Opinion Fails To Decide The Issue Of Post Injunction Damages.

The opinion affirms damages against petitioners for times subsequent to which Gasco had been enjoined from offering lower prices to plaintiff's customers. The opinion mistakenly asserts (Slip Op., p.14) that whether or not plaintiff was able to raise its prices immediately after the injunction "is an issue of fact that the jury resolved" against petitioners. The jury received no evidence or instructions with respect to the injunction issue. This was a question that was presented to the trial court as a matter of law and should have been similarly resolved by this Court.

Prior to the beginning of the trial, the parties stipulated that the preliminary injunction against PRI and Gasco and the subsequent order that OGS abused the injunction would not be mentioned before the jury (Transcript of Proceedings, Posttrial Motions, at 59). Thus, the jury could not possibly have considered the issue of whether OGS was able to raise its prices after the injunction was entered against PRI, as the jury was never informed that the injunction existed or instructed with particularity regarding the causation issue.[3]

As a matter of law, OGS cannot recover as damages the lost profits resulting from OGS's voluntary discounts in effect after entry of the preliminary injunction forbade Gasco from continuing its offers of price reductions. This is so for two reasons. First, the entry of the preliminary injunction cut off the necessity for OGS to

[3]To the contrary, the only instruction mentioning the temporary volume allowance implied that if the jury found that PRI's 1982 marketing offers were unlawful, the jury should find that the temporary volume allowances were recoverable by OGS as damages. *See* Instruction No. 49, paragraph 3.

meet Gasco's competitive offers and broke the causative chain of antitrust injury as a matter of law. *Cf. Los Angeles Mem. Coliseum Comm'n* v. *NFL*, 791 F.2d 1356, 1372 (9th Cir. 1986). Second, an antitrust plaintiff, like any other plaintiff, is under a duty to mitigate its damages, a duty OGS failed to discharge when it continued its TVAs. *Golf City, Inc.* v. *Wilson Sporting Goods Co.*, 555 F.2d 426, 436 (5th Cir. 1977). The trial court erroneously rejected these contentions, and the opinion mistakenly overlooks this issue.

III. CONCLUSION

For all of the foregoing reasons, we respectfully pray that the petition be granted and that rehearing be held by the Court sitting en banc.

Respectfully submitted,

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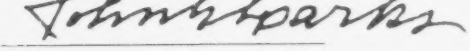
By 

John E. Sparks

Attorneys for Petitioners
Pacific Resources, Inc.
and Gasco, Inc.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on June 17, 1988, I served the within *Petition For A Writ Of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

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I declare under penalty of perjury that the foregoing is true and correct. Executed on June 17, 1988, at Los Angeles, California.

Betty J. Malloy
(Original signed)

Supreme Court, U.S.
FILED
JUL 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2096

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

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VS.

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Respondents.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

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LIST OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES PURSUANT TO RULE 28.1

Pacific Resources, Inc.
- Gasco, Inc.
- Enerco, Inc.
- PRI Energy Systems, Inc.
- Promana, Inc.
- Hawaii Energy Resources, Inc.
  - Hawaiian Independent Refinery, Inc.
  - PRI International, Inc.
  - PRI Northwest, Inc.
  - Pacific Resources Terminals, Inc.
  - Petroterm, Inc.
- International Solarpanel, Inc.
- PRI Marine, Inc.
- PRI South Pacific, Inc.
  - South Pacific Resources, Inc.
  - Triad Pacific Petroleum Limited
  - Tonga Pacific Limited
  - Trans Pacific Resources (Fiji) Ltd.
- Mid Pacific Resources, Inc.
  - Paramount Petroleum Corporation
- Energy Factors, Incorporated
- PRI ASIA PTE LTD.
- PRI Eastern Limited
- PRI International Limited
  - PRI Finance Limited
  - PRI Pacific Limited
    - Societe Polynesienne de Distribution D'Hydrocarbures
  - ASIAN PACIFIC RESOURCES SDN BHD
- P.R.I.N. Limited
  - Pacific Resources (Liberia) Limited
  - Pacific Resources Limited
    - Brewer Pacific Agronomics Co.
- Pacific Energy Resources, Inc.
  - Pacific Texas Resources, Inc.
- PRI Leasing, Inc.

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No. 87-2096

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

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Petitioner,

VS.

PACIFIC RESOURCES INC. and GASCO, INC.,
Respondents.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Petition for Certiorari ("Petition") presents a question for review that is entirely fact specific, relating to the individual "circumstances" of this case, and raises no important issue of law that is worthy of consideration by this Court. We accept the question as stated. However, the statements of facts and proceedings before the Court of Appeals are incomplete and inaccurate. We set forth below a statement of uncontroverted facts supported by references to the record before the Court of Appeals and a summary of the proceedings below.[1]

[1] The record references are to the record before the Court of Appeals. We cite the Appendix to the Petition as "App. A", etc. and the Appendix to this brief as "App. 1", etc. Emphasis is added in quoted matter unless otherwise stated.

I

STATEMENT OF FACTS

A. The Parties

Respondent Gasco, Inc. ("Gasco") is the wholly owned subsidiary of Respondent Pacific Resources, Inc. ("PRI") (C.R. 265, p.6). Gasco is, and has been since the 1950's, engaged in the retail distribution and sale of propane and SNG in Hawaii (RT3:67, 13:13). Petitioner Oahu Gas Service, Inc. ("OGS") was formed in late 1972 by a former officer and director of Gasco and PRI, James Fransden, to engage in the distribution and sale of propane on the Island of Oahu (C.R. 265, pp.8-9).

B. The Propane Markets

Prior to 1982, Standard Oil Company of California ("Chevron") was the sole manufacturer of propane in Hawaii, and prior to 1972, Chevron operated the only petroleum refinery in Hawaii (RT13:13). At all relevant times, Chevron and the federal government have dominated wholesale propane sales in Hawaii (App. C, p.20). In 1972 PRI's subsidiary, Hawaiian Independent Refinery, Inc. ("HIRI"), completed construction of, and introduced into commercial operation, a small refinery on Oahu for manufacture of petroleum products, not including propane. As discussed below, HIRI considered entering the wholesale propane market by adding a propane unit to its refinery prior to the initiation of federal price control in late 1973, but delayed that investment until 1982 after the end of price control.

Chevron was for many years the major retail distributor of propane in Hawaii. Chevron withdrew from that business in the 1950's and thereafter sold propane to Gasco, which became the sole retail distributor of propane in Hawaii until the entry of OGS in 1972. (RT3:67, 13:13.) OGS was conceived to target Gasco's large commercial, industrial and multi-family unit customers on the Island of Oahu. Frandsen recognized that these large volume propane users, as compared to residential users, required less handling, less investment and were the "key to this type of business and always will be" (RT9:142). As the Petition states (p.4), "Chevron encouraged James Frandsen to form OGS, and

eventually contracted with OGS for propane supplies" (Exs. 958, 2074). As Frandsen testified, "they [Chevron] had already established the fact that they were going to have a second distributor out here" (RT9:99). OGS did not enter the less lucrative propane distribution business on the Neighbor Islands of Hawaii, where Gasco continued to be the sole propane distributor. After its entry in 1972, OGS increased market share every year. By 1983 OGS had 30% of propane retail sales on Oahu (RT4:155-56; Ex. 1318) and 78% of the sub-market of large commercial and industrial users (RT3:68-69). A third retail propane marketer, Aloha Gas, commenced operations on Oahu in 1983 (RT12:107-08).

C. Federal Government Regulation

The Emergency Petroleum Allocation Act was enacted in November 1973, governing petroleum prices and supply relationships. The federal government (ultimately through the Department of Energy ("DOE")) exercised complete control over both propane prices and the allocation of propane supplies until 1981 with the purpose and effect of displacing "normal market forces" (RT14:193, 194, 198).[2]

The federal regulations superseded the contractual supply relationship between Chevron and its customers, Gasco and OGS. In place of a contractual supply commitment from Chevron, DOE assigned OGS an allocation of a portion of Chevron's supply to Gasco during the base period (RT14:205-6). Because price controls made propane production less profitable than using the components of propane to produce other products, Chevron limited its production of propane to the minimum required by DOE. (*E.g., Gasco Inc*, 1 FEA ¶ 20,724 (Dec. 6, 1974).) Gasco was not able to obtain the quantity of Chevron propane necessary to supply its customers and imported foreign propane at a significantly higher cost (RT2:78). OGS obtained all of its supplies

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[2] 15 U.S.C. § 751 *et seq.* (1973); 10 C.F.R. Part 211 (Mandatory Petroleum Allocation Regulations) and Part 212 (Mandatory Petroleum Price Regulations).

from Chevron and enjoyed a cost advantage over Gasco.[3] This cost advantage permitted OGS's business to grow at an even more rapid rate than OGS predicted in its initial business projections (RT9:168-69, 15:84-86; Exs. 2120, 2149, 2191).

Even with its rapid growth and cost advantage, OGS did not utilize all of the propane made available to it by Chevron under the regulations until 1976 (Exs. 2633, 2822). Over the next six years, OGS petitioned DOE on numerous occasions seeking an order requiring Chevron to provide more propane to OGS. Gasco opposed OGS's requests on the ground that providing OGS with a greater percentage of the low price Chevron propane would only require Gasco to import greater quantities of more expensive foreign propane and thus increase the cost advantage that OGS already enjoyed. Based primarily on this reasoning, the DOE regularly denied OGS's requests.[4] Finally, in July, 1979, DOE increased OGS's supply of domestic propane on the condition that OGS pay an amount necessary to offset partially the additional costs Gasco would incur to import more foreign propane.[5]

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[3] Mr. Frandsen admitted, as the DOE had determined, that OGS enjoyed a competitive advantage over Gasco in the cost of propane because OGS purchased only price controlled domestic propane from Chevron while Gasco purchased additional supplies at higher prices on the world market (RT12:107-08). The DOE stated (Ex. 110, p.7):

> Since OGS purchases only the lower cost domestic propane, its product cost is considerably less than Gasco's product costs. . . .

[4] In its Order dated September 20, 1978, the DOE stated (Ex. 97, p.6):

> OGS enjoys a substantial cost advantage over Gasco, a cost advantage which would certainly be increased by the approval of an increased base period allocation to OGS.
>
> • • •
>
> However, consumers will not necessarily benefit from "competition" in a market in which one firm enjoys a particular advantage.

[5] Ex. 97, pp.26-27. The $163,108 OGS paid in accordance with this DOE order was awarded trebled to OGS as damages as the "World Price Adjustment." OGS also was awarded as damages the $375,000

D. Modification of HIRI's Refinery

The government regulatory program also played a decisive role in HIRI's consideration of adding a propane recovery unit to its refinery in the mid-1970's. The HIRI refinery, which had commenced operations in 1972, was constructed to produce fuels for military uses. In early 1973, HIRI began to consider possible refinery modifications, including installation of new equipment to permit production of gasoline and commercial grade propane. HIRI commissioned both internal and external studies of these possibilities. (RT13:92, 99-100.) In 1973, HIRI anticipated that the refinery modifications would be completed by 1976 and that Gasco would be the primary purchaser of the new propane (Exs. 243, 381).

The 1973-74 government regulations, enacted after the Arab oil embargo in September 1973, impacted HIRI's plans by fixing a maximum wholesale price that could be charged by a refiner for propane. Since HIRI had never before produced propane, the price HIRI could charge would be determined under the "New Item Rule" (10 C.F.R. § 212.11), which limited HIRI to Chevron's maximum price for propane in Hawaii. (RT14:216-217.)[6]

The government ceiling price dramatically altered the economic viability of the proposed HIRI investment. As Joseph Pelletier, Executive Vice President of PRI, testified (RT13:101-02):

> The effect on our propane unit was that as we analyzed the cost, the investment we would have to put in . . . and we looked at and determined through contacts with the Department of Energy . . . what the pricing might be that we could

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which Mr. Frandsen "estimated" OGS spent in the various proceedings before the DOE.

[6] For refiners such as Chevron and HIRI the calculation of maximum ceiling prices it could charge for gasoline and propane were calculated under two separate and different formulas. Compare Subpart K, 10 C.F.R. § 212.161 *et seq.* (Mandatory Petroleum Price Regulations—Natural Gas Liquids) with Subpart E, 10 C.F.R. § 212.81 *et seq.* (Mandatory Petroleum Price Regulations—Refiners).

> sell that propane from the refinery, we found out that it was not economical.
>
> In fact, we'd have to make an investment in which we'd have a negative return on it. And so it just did not make sense to us to go ahead and proceed with it at that time.

Propane production was also uneconomic for Chevron, which was, nonetheless, required by DOE regulations to continue propane production and sale at regulated prices (Ex. 2656). However, HIRI was not required by DOE to *construct* a propane production unit and to *commence* propane production, and HIRI postponed its plans to do so in the interest of avoiding production of an uneconomic product. Mr. James Gary, the President and Chairman of PRI as well as President of HIRI, confirmed that propane production by HIRI did not make economic sense (RT:5:85):

> [I]t appeared that we would be tied to what Standard of California, for the allocation period, was being required to sell propane for also. And there's no way you could build a new facility and charge the Standard of California price and make the thing pay.

The foregoing evidence was uncontroverted. At trial, OGS did not dispute this evidence but elected instead to attack defendants' "lack of morality" in allowing Chevron to be saddled alone with the obligation of refining a commodity on which it was losing money. (RT18:152.)

Defendants acknowledged that HIRI would be required to sell propane to OGS if it made the investment to produce propane.[7] This was cited by OGS as "evidence" that HIRI's intent was to "starve" OGS. However, since HIRI modified its refinery and

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[7] (RT7:165; Exhibits 776, 778, 550.) There was no evidence that HIRI ever tried to avoid any obligation to supply OGS. To the contrary, PRI's Chairman, Mr. James Gary, testified that HIRI was prepared to supply propane to others (RT5:86-87.) He later reiterated that HIRI would "sell to them [OGS] today. In fact, I think we've offered to at one point or another" (RT5:90). OGS has never even asked to purchase HIRI propane (RT13:122).

commenced propane production in 1982 after the end of price controls in 1981, it has sold propane to Aloha L.P. Gas, a new entrant, to Gasco, and has expressed willingness to sell to OGS (RT6:87-89).

E. Gasco's 1982 Marketing Program

In late 1981 with the end of federal regulation, propane became more plentiful, and Gasco was beset by declining sales volume resulting from the installation of alternative energy devices such as electric heat pumps and solar powered water heating systems.[8] In response to these changing conditions, Gasco undertook a market analysis and developed a pricing and marketing strategy to compete with the substitute energy sources and with OGS for the high volume commercial and industrial users.

In March and April, 1982, Gasco sent more than 300 letters to present and potential industrial and commercial users of propane, including some being supplied under long term contracts with OGS, offering long term contracts at reduced prices (Exs. 2812, 2813; RT7:50-57). *OGS conceded at trial that the prices offered by Gasco were above Gasco's average total costs of supplying propane.*[9]

In response to Gasco's offers, OGS immediately instituted what it called a "temporary voluntary allowance" or "TVA," reducing its price to each of its contract customers (RT9:189-90).[10] As a result of the TVA, none of the OGS customers accepted Gasco's proposed contract, although all of them bene-

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[8] *E.g.*, Exhibit 2808. Gasco lost 2 to 3 million gallons of propane sales, approximately 10% of its business, to heat pumps between 1980 and 1985. (RT2:160-161.)

[9] OGS's assertion in its complaint that the prices offered by Gasco were below cost as well as its claims that these offers violated the Robinson-Patman Act and Hawaii state law were abandoned at trial (C.R. 310, 341).

[10] Mr. Fransden's unsupported conclusory testimony that the TVA's "almost" forced OGS into bankruptcy was belied by the fact that OGS was profitable throughout the period at issue (RT9:168-69; Ex. 662, p.33).

fited from the lower prices resulting from this competition (RT9:191). Some existing Gasco customers accepted Gasco's contracts, and they also enjoyed reduced propane prices (RT 7:14-17).

II
THE DISTRICT COURT PROCEEDINGS

The complaint was filed in 1977, asserting violations of Sections 1 and 2 of the Sherman Act, Section 3 of the Clayton Act and various Hawaii statutes. In 1982 petitioner obtained a preliminary injunction restraining Gasco from soliciting petitioner's contract customers (C.R. 184). Thereafter, the court ordered petitioner to desist from misrepresenting the injunction to potential and existing customers (C.R. 246).

Throughout the many years of pretrial proceedings in this case, petitioner's principal contentions were that respondents had violated Section 2 by conducting sham proceedings before DOE and engaging in predatory pricing. At trial, however, petitioner abruptly abandoned those theories and asserted, instead, that the violation of Section 2 consists of (1) HIRI's decision not to invest in and construct a propane recovery unit at its refinery in 1974 and 1975 and (2) "sham" offers of reduced prices to OGS's customers in 1982. (*See* RT1:9-97, 131; RT17:69, 89; RT18:165; C.R. 363, p.7.) As the District Court noted, "the case which was tried was entirely different from the case which was filed" (C.R. 379, p. 8).

The jury returned a verdict in favor of petitioner awarding damages of $4,963,998 ($1,654,666 trebled).

Following the trial, respondents filed a motion for judgment n.o.v. on three separate and independent grounds: (1) that the evidence was insufficient to permit a conclusion that distribution of propane was susceptible to monopolization by PRI-Gasco; (2) that petitioner failed to offer sufficient proof of conduct violative of the standards of competition imposed by Section 2; and (3) that the evidence of injury and damage was too speculative to go to the jury. On June 2, 1986, the District Court, *inter alia*, denied respondents' motions for a judgment n.o.v. and

granted petitioner $873,324 in attorneys' fees (C.R. 358, 359, 362, 372, 379). The District Court's memorandum and order devoted one paragraph to respondents' motion (C.R. 379):

> While the Court had indicated that it might well have found a different result, or at least made inquiry beyond that presented to the jury had the case been tried to the Court, there is substantial evidence to support the jury's verdict. The Motion for Judgment Notwithstanding the Verdict is denied.

III

THE PROCEEDINGS IN THE COURT OF APPEALS

The Opinion issued October 9, 1987, (1) reversed the portion of the judgment based on the refinery modification contention on the ground that respondents had established undisputed efficiency justifications for delay of its refinery modification (App. A, p.10); (2) affirmed the portion based on the 1981 price reductions on the ground that there was "clear and convincing evidence" to support the jury's verdict that respondents' reduced price offers were predatory (*id.*, p.12); and (3) remanded to the District Court to "recalculate" the award of attorneys' fees (*id.*, p.14).

On October 23, 1987, respondents filed a petition for rehearing, contending, *inter alia*, that Gasco's offers of reduced prices above average total cost were lawful, regardless of the existence of predatory intent, in the absence of clear and convincing evidence of an injury to competition (App. E, p.3). Petitioner did not file a petition for rehearing but did file a petition for clarification (App. 1), which urged that the Opinion be "clarified" in two respects: (1) by defining the term "uneconomical" as used in the discussion of the refinery modification issue to mean "unprofitable" and (2) by deleting reference to the "clear and convincing" evidence standard from the discussion of Gasco's 1982 marketing campaign.

On November 27, 1987, the Court of Appeals issued its Amended Opinion, which contains essentially two changes: (1) the discussion of the refinery modification issue is revised to

state, among other things, that the investment required to produce propane in the HIRI refinery would have resulted in a "negative return" in the light of "price controls" and, therefore, was "not economically efficient" (App. B, p.10); and (2) the discussion of the 1982 marketing program was revised to eliminate the clear and convincing evidence standard applied in the Ninth Circuit in predatory pricing cases. The Amended Opinion holds that "sham" or "fraudulent" offers of reduced prices "whose only rationale is a desire to drive rivals out of the market" are illegal under Section 2 and that "the evidence reasonably supported the jury's finding of a predatory rationale" (App. B, p.13). The Amended Opinion does not address, or purport to rule upon, respondents' petition for rehearing.

On February 1, 1988, the Court of Appeals issued its Order and Opinion (App. C). The Order withdraws the earlier two opinions, and the Opinion reverses the judgment below in its entirety. The February 1 Opinion contains an expanded discussion of market power and relevant markets (App. C, pp.8-16), republishes the Amended Opinion's discussion of the refinery expansion issue (App. C., pp.17-20), and reverses the judgment based on the 1982 marketing campaign on the basis of the traditional Section 2 concept that the correct test for predatory conduct arising from offers of prices above average total cost is whether the offers "unreasonably restrict competition" (App. C, pp.21-22).

Subsequent to the issuance of the February 1 Opinion, the Court of Appeals denied respondents' petition for rehearing as moot. Petitioner filed a timely petition for rehearing limited to the issue of the 1982 marketing campaign (App. 2). Consistent with its position on the October opinion, petitioner did not seek rehearing with respect to the refinery expansion issue. Petitioner now seeks to have this Court review the Opinion's analysis of Section 2 conduct *in toto*, claiming that it involves the jury's proper role and function in a Section 2 case.

REASONS FOR DENYING THE WRIT

The Opinion applies settled principles of antitrust law to particular facts. It is highly specific to the particular circum-

stances of the case, which occurred, in part, under the discarded framework of federal regulation over the supply and pricing of propane. The Petition points to no conflict among the Circuits, no issue of antitrust law or important aspect of this particular case that should prompt this Court to entertain a discretionary review.

I

THE QUESTION PROPOSED FOR REVIEW IS VAGUE, FACT SPECIFIC AND DEVOID OF ANY REASON FOR INVOKING THIS COURT'S REVIEW

Petitioner seeks to have this Court review an amorphous, open-ended question, asking (Petition, p.i):

> Given monopoly power in properly defined relevant product and geographic markets, *under what circumstances* can an appellate court determine that the monopolist's conduct is procompetitive as a matter of law and *under what circumstances* must the appellate court abide the fact finder's determination *if supported by substantial evidence?*

This question is so vague as to be meaningless and does not present any issue on which the Circuits are in conflict or any question of overriding importance of statutory interpretation justifying this Court's review. The relevant legal standards for review are set forth in the Opinion,[11] and the Petition does not take issue with them. Rather, the Petition contends that under the circumstances of this particular case the Court of Appeals improperly set aside the verdict of the jury, which, petitioner contends, was supported by substantial evidence. Even if that were so, which it is not, review would entail and require a detailed inquiry into the trial record and would involve only questions of fact and evidence.

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[11] The Opinion states the standards of review, applicable to species of conduct found to violate Section 2 (App. C, p.16):

> These determinations that specific conduct was anticompetitive in violation of the Sherman Act are questions of law that we review *de novo*. *Western Concrete Structures Co. v. Mitsui & Company (U.S.A.), Inc.*, 760 F.2d 1013, 1016 (9th Cir.), *cert. denied*, 474 U.S. 903 (1985).

The Petition suggests that by reviewing this case, the Court will be able to draw a bright line between "what monopolistic behavior can be held procompetitive as a matter of law" and "what monopolistic behavior presents for a jury a justiciable fact issue" (Petition, p.12). This suggestion simply does not bear analysis. The two courses of conduct that were here challenged to be in violation of Section 2 are well within the zone conceded by the Petition to be "permissible acts even if done by a monopolist" (Petition, p.12).

The first was the decision of HIRI about the timing of "entry" into the "market" of manufacture and wholesale of propane, which is a market concededly not dominated by respondents (App. C, p.20). Consistent with the Court's decision in *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966), the lower federal courts have refused to second-guess even a monopolist's decisions about the timing of market entry. *E.g., Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 286 (2d Cir. 1979) *cert. denied* 444 U.S. 1093 (1980) ("Any firm, even a monopolist, may generally bring its product to market whenever and however it chooses. . . ."); *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 545 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984) ("Without more, it is not unlawful for any competitor in any market to delay the introduction of a new product or an entire line of new products until . . . the competition forces such introduction."). And a related line of cases holds that a monopolist may make product changes justified by efficiency. *E.g., California Computer Products, v. International Business Machines Corp.*, 613 F.2d 727, 744 (9th Cir. 1979) (Cost-justified changes in product design "did not present a jury issue."). *Compare, Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), where the Court upheld a verdict for the plaintiff based on conduct by a monopolist *cancelling* a long-standing market relationship, which effected an "important change" in the character of the market, on the ground that there was *no* business justification (*id.* at 604-5). Here, the Court of Appeals refused to permit the jury to second-guess HIRI's decision not to invest in propane manufacturing facilities *when propane production was economically inefficient* and when the decision left the existing retail propane markets and supply

relationships exactly as they were. Rather than challenging the formulation of the permissible conduct, the Petition (16-20) quibbles with the Court of Appeals' analysis of the economic facts of record.

The second course of challenged conduct was Gasco's 1982 marketing program, consisting of offers of reduced prices above average total cost to high volume propane consumers. Economic theory and reported decisions suggest that price-cutting in this range presents no danger to competition and consumer welfare. *E.g.*, Areeda, P. & Turner D., III Antitrust Law ¶ 714 (1978 ed.) and ¶ 711.1 (Suppl. 1987); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1056 (6th Cir.) *cert. denied*, 469 U.S. 1036 (1984); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232-36 (1st Cir. 1983); *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981); *MCI Communic. Corp. v. AT&T*, 708 F.2d 1081, 1111-1123 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Southern Pacific Communic. Co. v. AT&T*, 740 F.2d 980, 1005 (D.C. Cir.), *cert. denied*, 470 U.S. 1005 (1984) (conclusive legality for prices above average cost is "relatively uncontroversial"); *see also Matshushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) ("there is consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful."); W. Liebler, *Whither Predatory Pricing? From Areeda and Turner to Matshushita*, 61 Notre Dame L. Rev. 1052 (1986).[12] Again, the Petition does not challenge the rule of law applied but argues that the Court of Appeals has incorrectly concluded that Gasco's price reductions did no injury to competition.

The Petition in effect suggests that this Court review every appellate decision arising under Section 2 of the Sherman Act to assure that the Court of Appeals correctly analyzed the facts and did not invade the province of the jury. Such a review is not a

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[12] In the Ninth Circuit price reductions above average total cost are predatory only if injury to competition is demonstrated by clear and convincing evidence. *Transamerica Computer Co. v. International Business Machines Corp.*, 698 F.2d 1377, 1387 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983).

suitable exercise of this Court's discretionary jurisdiction. *United States v. Johnston*, 268 U.S. 200, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

II

THE COURT OF APPEALS FOLLOWED TRADITIONAL SECTION 2 ANALYSIS AND CORRECTLY REJECTED PETITIONER'S ABERRANT LEGAL CONTENTIONS

A review of the Opinion below discloses a proper disposition of the case. The appellate court cited and followed the proper standard for review of a jury verdict on a j.n.o.v. motion. It also properly applied mainstream Section 2 principles.

As noted above, petitioner's disagreement with the Opinion is in its application of settled law to the specific facts of this case. Beyond that, the Petition addresses a general lament about the development of law under Section 2 and invites this Court to undertake a reversal of field, starting with this fact-specific case.

A. Section 2 Does Not Require Manufacture Of An Inefficient New Product

As stated above, petitioner's theory of the case, based upon a presumed obligation by respondents to invest in refinery improvements for the benefit of petitioner, was advanced on the eve of trial. It is unprecedented and contrary to the principles of competition underlying the antitrust laws. It should have been rejected by the District Court, and reversal by the Court of Appeals did not even present a close question.[13]

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[13] Petitioner's show of indignation here is somewhat suspect in the light of the failure below to raise the issues here presented in a petition for rehearing. Rather, in its motion for clarification petitioner simply requested the Court to specify that the refinery construction would have been uneconomic because "unprofitable." There was no suggestion of an evidentiary controversy about such a conclusion, and petitioner's subsequent petition for rehearing (App. 2) does not mention the refinery modification issue.

In attacking that reversal here, petitioner erroneously portrays the Opinion below as relying solely on the business "acumen" exception referred to in *United States v. Grinnell*, 384 U.S. 563, 571 (1966). The Opinion also cites and relies upon the cases, cited p.19 *supra*, holding that a monopolist may decide when to bring a product to market and upon *Aspen Skiing Co., supra*, and other cases holding that conduct justified by "efficiency" is generally exempt from further Section 2 scrutiny. All of these cases support the conclusion of the Court of Appeals that respondents were not required by Section 2 to begin manufacture of a new product to assist petitioners, particularly when there is an efficiency justification for not doing so.

Petitioner's argument below was based on a misguided extension of *Aspen Skiing* and an effort to find support in a line of supply restriction cases. The Court of Appeals' analysis is entirely consistent with those cases, none of which supports petitioner's argument.

The basic problem with both analogies is that respondents were not engaged in the *production of propane* and had no conceivable monopoly power in the wholesale propane market. Respondents' alleged market power was at the next level, retail distribution.[14] In contrast, the monopolist in *Aspen Skiing* exercised monopoly power in the same market (the supply of ski lift tickets) from which plaintiff was excluded. Similarly, in the supply restriction cases, monopoly power was exercised in the market in which supply was restricted. This basic distinction is relied upon by the Opinion below.[15]

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[14] The Opinion (App. C, 12) expresses doubt about the correctness of the jury's finding that Gasco exercises monopoly power in a relevant market for retail distribution of propane.

[15] "A theory of liability based on 'supply restriction' must fail because Pacific Resources had no monopoly power over supplies of propane to Hawaii. Chevron produced all Hawaiian propane until 1982. Contrary to Oahu's argument, the regulatory scheme in place in the 70's did not give Pacific Resources control over propane supplies. Oahu appealed to the Department of Energy for larger

Aspen Skiing does not support petitioner's theory for a second important reason. The monopolist in that case, as Justice Stevens' Opinion carefully notes (475 U.S. at 603), did not merely refuse to enter into "a cooperative venture" proposed by a competitor. "Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years." (*Ibid.*) Here, HIRI's election not to commence manufacture of propane made no change whatsoever in the pattern of distribution or competitive market. *Compare, Olympic Equipment Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 375-76 (7th Cir. 1986) *cert. denied*, 1075 S.Ct. 1574 (1987) (" 'There is a difference between positive and negative duties, and the antitrust laws, like other legal doctrines sounding in tort, have generally been understood to impose only the latter.' *USM Corp. v. SPS Technologies Inc.*, 694 F.2d 505, 512-13 (7th Cir. 1982).").

The fundamental tenet of the Opinion on this issue is that here, unlike *Aspen Skiing*, as a matter of law there was an efficiency justification for delaying investment in the propane unit. This justification was created by the price control regulations imposed by the federal government on the manufacture of propane at a time when HIRI was evaluating proposed refinery modifications.[16] After consulting with DOE and concluding that HIRI would be tied to Chevron's pricing under the DOE New Item Rule and that the investment in a propane unit would produce a negative return, HIRI deferred investment in the propane recovery unit until after price controls of propane were discontinued in early 1981. As stated in the Opinion (App. C, p.18), "in light of

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allocations of propane, and it was ultimately successful." (App. C, p.20.)

[16] The regulatory scheme for propane and natural gases was different under the regulations from that applicable to gasoline. Because propane is a heating fuel essential in remote areas and has special importance in drying crops, there were special concerns about maintaining a lower price. *See Mobil Oil Corp. v. Federal Energy Admin.*, 566 F.2d 87, 94-97 (TECA 1977). Thus, it was profitable to manufacture gasoline, but not propane. *See Oahu LP Gas Service, Inc.* 2 FEA ¶ 85,009 at 85,002 (Feb. 11, 1975); *Standard Oil Co. of Calif.*, 2 FEA ¶ 80,618 (June 26, 1975).

the then-existent price controls, it was not economically efficient" to produce propane. Hence, "as a matter of law," respondents' "decision to refrain from producing propane because it was not economically efficient is sufficient justification to preclude anti-trust liability" (*id.* at p.20).

The Petition suggests that the Court of Appeals was obligated to go beyond respondents' prima facie evidence of efficiency justification and "ensure" that the justification for the delay in refinery modification had "the net effect of producing better products at lower prices or otherwise benefiting consumers" (Petition, p.19). This assertion is contrary to this Court's statement in *Aspen Skiing* that any valid business justification for the exclusionary conduct would exonerate it from further Section 2 scrutiny (472 U.S. at 605).[17] It is axiomatic that demonstration of efficiency justification will tend to confer economic benefits on consumers and result in better products and lower prices. Here, HIRI was a new entrant into the refining market in competition with Chevron. Decisions designed to avoid money-losing products would tend to greater efficiency and competitiveness in the market for other products.

Petitioner points to the evidence that Gasco imported propane at a higher cost than domestic propane and that the refinery

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[17] Judge Pierce rejected a similar contention in *GAF Corp. v. Eastman Kodak Co.*, 519 F.Supp. 1203, 1231-32 (S.D.N.Y. 1981), that Kodak could be liable under Section 2 for failure to market in the United States a film being sold by Kodak in other countries, stating as follows:

> To create the possibility that treble damages might be awarded on the basis of a finding (made with the benefit of hindsight) that a firm's failure to introduce a product was anticompetitive would impose a significant chilling effect on innovation and research not envisioned by § 2. . . . The chilling effect on innovation would encourage the very industrial sluggishness the Sherman Act was designed to prevent. Notably, so far as this Court is aware, no court has yet found a monopolist's failure to market a product as satisfying § 2's conduct requirement.
>
> Secondly, . . . the ability of the judicial system to determine whether a product should have been marketed, and, if so, when is severely limited . . . .

modification cost more in 1982 dollars than it would have cost in 1973 dollars, and speculates that HIRI's investment decision may not have been in the *long-run* combined economic interests of HIRI-PRI-Gasco, but petitioner offered no demonstration to the courts below to substantiate the truth of its speculation. If petitioner's speculation were accepted as true, it is nonetheless irrelevant. The essence of predation is action taken that is not profit-maximizing in the short run and that depends on long-run recoupment through future monopoly pricing to make it rational economic behavior. *See Matshushita, supra*, 475 U.S. at 588-89. It is perverse for petitioner to argue that a decision not to invest in propane production equipment is predation in violation of Section 2 because the investor thereby maximized short run profits at the expense of unpredictable, uncertain long run benefits. *See generally*, F. Easterbrook, *On Identifying Exclusionary Conduct*, 61 Notre Dame L. Rev. 972 (1986). Moreover, interjecting retrospective review of events subsequent to the conduct in question as an element of the test for liability would arbitrarily punish decision makers with treble damages, would distort investment decisions and deter investment and would invite antitrust defendants to argue that adjudication of classic predatory acts should await excuse through evaluation of their long-run effects. In short, petitioner advances an aberrant, erroneous theory.

B. Section 2 Does Not Prohibit Price Reductions Above Average Total Cost In The Absence Of Injury To Competition

The 1982 marketing campaign was also adequately addressed by the Opinion below. Under proper j.n.o.v. standards the Opinion finds that the parties did not dispute that the price levels of the offers were above Gasco's average total cost (App. C, pp.7, 21).[18] The Opinion accepts petitioner's contention that the jury found that the offers were insincerely made for the purpose of inducing OGS to lower its prices and were for that reason "shams" (*ibid*) and then addresses petitioner's contention that sham offers at levels above average total cost are predatory conduct under

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[18] Petitioner also remained profitable under the new prices. Ex. 662 shows petitioner's pretax profit per gallon to be 1980-12.05¢, 1981-17.64¢, 1982-15.48¢, 1983-15.58¢.

Section 2. The Opinion concludes that there was no evidence of an injury to competition from Gasco's offers and that the resulting reduced prices to OGS's customers were, if anything, procompetitive (*id.*, p.22-25).[19] Applying the antitrust axiom that anticompetitive intent alone does not establish predatory conduct and refusing "to turn our back on a large body of case law" (App. C, p.22) requiring injury to competition for Section 2 liability, the Court of Appeals reversed the judgment below on the ground that Gasco's offers were not illegal under Section 2 as a matter of law.

The Petition argues that the change of position by the Court of Appeals between its vacated October 9, 1987 Opinion and November 27, 1987 Amended Opinion and the final February 1, 1988 Opinion is "unexplainable" (Petition, p.20). In fact, the change is readily explained by the sequence of events described above (pp.9-10). The first Opinion erroneously held that the jury had found that Gasco's conduct amounted to predatory pricing under the clear and convincing evidence standard that governs price reductions above average total cost in the Ninth Circuit.[20] Inasmuch as the jury had been given no such instruction because OGS contended that this is not a predatory pricing case, petitioner's petition for clarification requested that the Opinion be modified by elimination of the clear and convincing evidence standard (App. 1, pp.3-4). The November 27, 1987 Amended Opinion was in fact so modified and was thereby rendered facially erroneous under traditional Section 2 analysis because respondents' conduct patently caused no injury to competition. The final Opinion corrected this error and, belatedly perhaps, reached the

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[19] Petitioner's argument that it could have made more profits by maintaining its high prices and pouring the profits back into expanding its business is not evidence of anticompetitive effect. Every business is presumed to have a limitless desire for higher profits and to grow and to evolve as a business. However, the fact that events in the marketplace may place some limits on the desires of OGS does not make those events of concern under the antitrust laws where the focus is on injury to competition and not on injury to a competitor. *Cargill, Inc. v. Montfort of Colorado, Inc.*, 479 U.S. 104, 107 S.Ct. 484, 492 (1986).

[20] *Transamerica Computer Co. v. International Business Machines Corp.*, 698 F.2d 1377, 1388 (9th Cir. 1983).

correct conclusion that even a monopolist is entitled to engage in price reductions, so long as there is no injury to competition. *Cargill, Inc. v. Montfort of Colorado, Inc.*, 479 U.S. 104, 107 S.Ct. 484, 492 (1986); *Drinkwine v. Federated Publications, Inc.*, 780 F.2d 735, 739 (9th Cir. 1985), *cert. denied* 106 S.Ct. 1471 (1986); *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1192 (9th Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985); *Transamerica Computer Co. v. International Business Machines Corp.*, 698 F.2d 1377, 1388 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1028 (9th Cir. 1981) *cert. denied*, 459 U.S. 825 (1982); *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 740-47 (9th Cir. 1979); *Olympia Equipment Leasing Co. v. Western Union & Tele. Co.*, 797 F.2d 370, 379 (7th Cir. 1986) *cert. denied* 107 S.Ct 1524 (1987); *Cf. Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

CONCLUSION

There is no issue of the role and function of the jury in monopolization cases here worthy of review by the Court. The Court of Appeals applied conventional Section 2 principles and standards of appellate review. Its garden-variety reversal of denial of a j.n.o.v. motion in a Section 2 case does not merit this Court's attention. The petition for a writ of certiorari should be denied.

Dated: July 21, 1988.

Respectfully submitted

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APPENDIX 1

No. 86-2250

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

OAHU GAS SERVICE, INC.,
Plaintiff-Appellee,

VS.

PACIFIC RESOURCES, INC. and CASCO, INC.
Defendants-Appellants.

APPELLEE'S PETITION FOR CLARIFICATION

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The Court's decision in *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, slip. op. 86-2250 (October 9, 1987) constitutes an important new precedent in Section 2 antitrust case law. This opinion will undoubtedly be looked to by lower courts in determining what conduct, when taken by a monopolist, violates the Sherman Act. It is essential, therefore, that its holding be clearly delineated. Accordingly, without seeking to affect the result reached, the appellee Oahu Gas Service, Inc. ("OGS") respectfully calls to the Court's attention two aspects of its opinion which merit further clarification.

1. *Clarification of the term "uneconomical"*

In its discussion of the appellants' decision not to expand its refinery, the Court observed that "[b]ecause producing propane would have been uneconomical at the time, Pacific Resources' decision to forego propane production did not exclude competition unnecessarily." *Id.* at 9. *See also id.* at 9 n.2, 10 (use of term "uneconomical"). The term "uneconomical," however, is not defined.

Accepting the Court's decision that the monopolist's duty to cooperate with a competitor is vitiated where the cooperation in "uneconomical," *id.* at 10, there is a real need to delineate carefully what is encompassed within that term. Clearly, a sweeping definition of "uneconomical" to embrace *any* reduction of revenues or profits would emasculate the Court's basic holding that in some cases "the antitrust laws impose what may be characterized as affirmative duties." *Id.* at 9. Seldom, if ever, will cooperating with a competitor be completely without cost. In the usual case, curtailment of conduct unnecessarily restrictive of competition will result in the monopolist having to forego at least some opportunity for increased sales and increased profits. As the Supreme Court acknowledged in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S.Ct. 2847 (1985), such lost revenues and profits cannot constitute a business justification sufficient to save a non-cooperating monopolist from liability. *Id.* at 2852.

Unfortunately, if not clarified, the term "uneconomical" may be construed by lower courts to encompass *any* diminution of a monopolist's revenues or profits, thus vitiating the rule of *Aspen* and rendering this Court's notion of a monopolist's affirmative duties a nullity.

OGS, therefore, respectfully requests the Court to specify that "uneconomical" means "unprofitable." Such a definition comports with the appellants' contentions as to the reasons why it postponed construction of its propane refinery. *See* Appellants' Opening Brief at 9. *See also* RT 13:101-102 (the refinery investment would have produced a "negative return.") Defined as "unprofitable," the term "uneconomical" encompasses the particular facts of this case and provides lower courts with a specific guide with which to assess the scope of permissible conduct for a monoplist.

2. *Deletion of the opinion's 'clear and convincing' language*

In its opinion, the Court stated that "a plaintiff in Oahu's position must show by clear and convincing evidence that the defendant's *pricing policy* had a predatory rationale." *Id.* at 12. (Emphasis added.) In that same paragraph, however, the Court observed that the relevant evidence was not the prices Gasco offered but rather the contracts themselves. *Id.* Thus, the conduct challenged in this litigation and found actionable by the Court was *not* Gasco pricing practices, but instead its offer of sham contracts.

The clear and convincing standard articulated in *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1193 (9th Cir. 1984), *cert. denied,* 469 U.S. 1213 (1985), has been reserved for those cases where the challenged conduct involves the level at which the defendant has set its prices, *i.e.*, its pricing policy. *See also Transamerica Computer Co. v. International Business Machines Corp.*, 698 F.2d 1377 (9th Cir.), *cert. denied,* 464 U.S. 955, 104 S.Ct. 370 (1983).[1] OGS knows of no case, however, where this heightened standard was applied to non-predatory pricing cases where consumer benefits from lower prices are not implicated.

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[1] The Court limited its holding to cases where the alleged predatory price is above defendant's average total cost:

> "Therefore, it is appropriate to impose on the plaintiff a greater burden of proving that prices above average total cost are predatory than the burden imposed by *Inglis* to prove that prices between average variable and average total cost are predatory. We therefore hold that if the challenged prices exceed average total cost, the plaintiff must prove by clear and convincing evidence—i.e., that it is highly probably true—that the defendant's pricing policy was predatory." 698 F.2d at 1388.

While OGS agrees with the Court's finding that Gasco's 1982 Marketing Campaign constitutes "clear and convincing" evidence, it does not agree that this modestly more stringent standard of proof should be extended to non-predatory pricing cases. Instead, OGS urges the court to reserve that standard of proof for cases where the defendant's pricing policies constitute the essence of the Section 2 offense. As this is not such a case, OGS respectfully asks the Court to delete the requirement of "clear and convincing" evidence set forth in its opinion.[2]

Dated: October 22, 1987

Respectfully submitted,

By /s/ MAXWELL M. BLECHER
Attorney for Plaintiff-Appellee
Oahu Gas Service, Inc.

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[2] Additionally OGS respectfully calls the Court's attention to a factual inaccuracy in the opinion which should be amended. On page 8 of the slip opinion the Court states: "The jury could reasonably have concluded that Oahu's success in capturing a significant market share on Oahu may have been due to the 'insider' status of its founder, once an executive with Gasco, who took some large accounts with him when he left Gasco." The last clause of this sentence is incorrect. Although OGS' President, James Frandsen had been employed by Gasco prior to founding the new company, he did not take any accounts with him when he left. Approximately one year elapsed between the time Mr. Frandsen left Gasco and when OGS began delivering to customers. OGS, in fact, did not even solicit customers until mid-1972, over half a year after leaving Gasco. While it is true that because Gasco had 100% monopoly of the Oahu propane market all of OGS' customers were former customers of Gasco, it was not contended by either party on appeal that Frandsen took customers with him when he left his former employ. More accurately, Mr. Frandsen's long years in the propane business in Hawaii and his intimate familiarity with that business facilitated OGS' entry into the propane market. The unintended implications of the Court's misstatement that Mr. Frandsen somehow misappropriated customers from his former employer is not consistent with the record presented on appeal. OGS, therefore, respectfully requests this Court to amend this statement striking the last clause.

APPENDIX 2

No. 86-2250
(USDC Hawaii: Civil No. 77-0444)
IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OAHU GAS SERVICE, INC.,
Plaintiff-Appellee,
vs.
PACIFIC RESOURCES, INC. and GASCO, INC.,
Defendants-Appellants.

PETITION FOR REHEARING
WITH SUGGESTION OF REHEARING EN BANC

I

STATEMENT OF COUNSEL

Oahu Gas Service, Inc. ("OGS") respectfully petitions the Court for reconsideration of the opinion filed on February 1, 1988. In abruptly reversing its two prior rulings, the Court adopted in material part the arguments asserted by defendants Pacific Resources, Inc. ("PRI") and Gasco, Inc. ("Gasco") in their October 27, 1987 petition for rehearing. OGS, however, was not afforded an opportunity to respond to the factual and legal contentions presented in defendants' petition. OGS, therefore, now seeks an opportunity to reply.

OGS specifically seeks rehearing on that part of *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, No. 86-2250, slip. op. (9th Cir. February 1, (1988) ("*OGS III*") that addresses Gasco's 1982 marketing campaign against OGS. In early 1982, Gasco implemented a plan to approach OGS customers with offers of prices substantially below those contained in the customers' existing long-term contracts with OGS. In making these offers, "Gasco's true goal was not to attract customers," but rather to force its smaller rival to lower significantly the price terms of its existing contracts. *OGS III* at 1275 ("true goal was . . . to cut into Oahu's profits."). OGS, faced with Gasco's sudden, intense and repetitive overtures to its customer base, responded by renegotiating many

contracts mid-term. By lowering the prices contained in these contracts, OGS was able to retain its customers, but lost over $400,000 in revenues as a result.

The Court, while acknowledging that Gasco's conduct in interfering with OGS' customers "smacks of unfair competition," held that absent proof of anticompetitive effect such conduct did not violate Section 2. *Id.* at 1276. Defining such anticompetitive effect as "the transfer of resources or patronage away from the rival and to the monopolist," the Court concluded that no such anticompetitive effect had been shown. *Id.* at 1277.

OGS respectfully requests reconsideration of the Court's finding that Gasco's 1982 marketing program resulted in no anticompetitive effect on two grounds:

(1) OGS respectfully submits that the Court's requirement that anticompetitive effect be shown by a diversion of resources or customers from the rival to the monopolist is unduly restrictive and inconsistent with the case law of this Circuit;

(2) Applying the appropriate analysis of anticompetitive effect, OGS respectfully submits that there was evidence sufficient to support the jury's inference that Gasco's 1982 marketing program in fact diminished competition in the Hawaiian propane market. In holding to the contrary, the Court has overlooked substantial evidence supporting the jury's finding.

II

ARGUMENT

A. The Court's Definition Of Anticompetitive Effect Is Too Restrictive.

The Court's reversal of its previous position regarding the illegality of Gasco's 1982 marketing campaign is grounded in its belief that, although reprehensible and arguably tortious, the defendants' conduct resulted in no proved anticompetitive effects.[1] *Id.* The Court notes that the net effect of Gasco's sham offers was merely a lowering of OGS' prices—an inference based

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[1] It is well-established that competitive torts, when used to achieve or maintain a monopoly, fall within the ambit of the Sherman Act. Boone, "Single Corporation Competitive Torts and the Sherman Act," 2 *Ga. L.*

on the testimony that Gasco did not obtain OGS customers as a result of its marketing program. *Id.* at 1275-76. Thus, the opinion reasons, because the plaintiff could not demonstrate that the defendants' conduct resulted in a diversion of resources or customers from OGS to the monopolist, it could not satisfy Sections 2's requirement of provable anticompetitive effect. *Id.* at 1277. Citing the oft-quoted aphorism that antitrust laws protect competition and not competitors, *OGS III* rejects plaintiff's claim of antitrust injury and reverses the jury's verdict. *Id.* at 1276-77.

To require an antitrust plaintiff to prove either a transfer of resources or patronage in order to establish anticompetitive effect, however, is both unjustified and contrary to existing authority. The inquiry into anticompetitive effect is singularly fact-based. *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983). *See also Hasbrouck v. Texaco, Inc.*, 830 F.2d 1513, 1519 (9th Cir. 1987). Thus, it is not susceptible to a characterization as a matter of law as suggested by *OGS III*. Rather, the requirement of anticompetitive effect mandates that the plaintiff demonstrate, based on the factual attributes of the market and the particular conduct at issue, that the vigor of marketplace rivalry, as opposed merely to the health of individual rivals, has been impaired. *See Kaplan v. Burroughs Corp.*, 611 F.2d 286, 291 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980). *See also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 97 S.Ct. 690, 697 (1977).

That the focus is on competition, as opposed to individual competitors, however, does not mean that the harm incurred by an individual rival is eliminated from the analysis. To quote from a recent Ninth Circuit opinion:

> The oft-quoted chestnut distinguishing between protecting competition and protecting competitors has been misconstrued with some regularity by antitrust defendants who appear to argue in all types of antitrust cases that the effect of unlawful conduct on competitors is irrelevant. The purpose of drawing a distinction between harm to competition and harm to competitors is to point out that not all acts that

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Rev. 372, 374 (1968) *See also* L. Sullivan, *Handbook of the Law of Antitrust*, 112-13 (1977).

> harm competitors harm competition. However, the converse is not true. *Injury to competition necessarily entails injury to at least some competitors.* Competition does not exist in a vacuum; it consists of rivalry among competitors. Clearly, injury to competitors may be probative of harm to competition, although the weight to be attached to such evidence depends on its nature and on the nature of the challenged conduct. The aphorism may not be invoked blindly in response to a showing that competitors have been harmed; otherwise it would often serve to shield unlawful conduct that adversely affects competition.

Hasbrouck, 830 F.2d at 1518 (emphasis added).

Antitrust plaintiffs in the Circuit and in others have demonstrated anticompetitive effect in a myriad of ways. For example, proof that the defendant's conduct has resulted in a diversion of resources or customers away from the rival and to the monopolist may evidence that the defendant's conduct has actualiy lessened competition. *See Western Concrete Structures Co. v. Mitsui & Co.*, 760 F.2d 1013, 1018 (9th Cir.), *cert. denied*, 474 U.S. 903 (1985); *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 556 (7th Cir. 1980). Such a showing, however, is not the only way to demonstrate anticompetitive effect. Other recognized indicia of anticompetitive effect include: raised barriers to entry as a result of defendant's conduct (*Helix Milling Co. v. Terminal Flour Mills Co.*, 523 F.2d 1317, 1322 (9th Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976); *Woods Exploration & Producing Co. v. Aluminum Company of America*, 438 F.2d 1286, 1307 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972)); increased costs incurred by a rival because of the monopolist's actions (*Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1296 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985); *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 472 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983)); and lost profits incurred by a plaintiff due to the defendant's manipulation of otherwise competitive prices (*Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 856-57 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981); *General Industries Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 807 (8th Cir. 1987).)

Notably, these latter three manifestations of anticompetitive effect do not require that the monopolist be the direct beneficiary

of its rival's lost patrons or revenues. In these situations, the defendant's reward is indirect. By impairing the ability of a rival to challenge its monopoly, the defendant reduces competition in the relevant market despite the fact that no sales or customers are diverted to it.

OGS III, by rejecting any indicia of anticompetitive effect absent proof of a diversion of resources or customers away from the rival, overlooks the substantial body of authority mandating a broader viewpoint. As established in *Brunswick*, it is not necessary for an antitrust plaintiff to demonstrate an actual lessening of competition in order to recover. *Brunswick*, 429 U.S. at 489 n. 14, 97 S.Ct. at 698 n. 14. *See also Lee-Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299, 1304-05 (4th Cir. 1979).

OGS III's holding that only those anticompetitive effects resulting in direct and provable benefits to the monopolist satisfy Section 2 is not only impermissibly restrictive but it also directly contradicts the well-established rule requiring a plaintiff to mitigate its loss. *Golf City, Inc. v. Wilson Sporting Goods Co.*, 555 F.2d 426, 436 (5th Cir. 1977). This tension is demonstrated by the facts presented in this case. Gasco approached OGS' customers with sham offers. OGS had two choices: it could either stand idly by and see how many customers would be drawn away by Gasco; or, it could seek to mitigate its loss by lowering its contractual price terms and by seeking a temporary injunction to halt Gasco's interference. Had OGS chosen not to respond at all, it is likely that it would have lost customers and even gone completely out of business. Ironically, such dramatic losses would satisfy *OGS III*'s rigid definition of provable anticompetitive effect. OGS' ability to recover for these direct effects, however, would have been vitiated by a claimed failure to mitigate. Conversely, by choosing to mitigate those losses caused by the monopolist and enabling itself to survive, OGS became ineligible for recovery under the narrow anticompetitive effect requirement of *OGS III*. To create such a catch-22 for the victims of predation by a monopolist is wholly inequitable and requires, plaintiff respectfully submits, reconsideration by this Court.

B. OGS Adduced Ample Evidence from Which the Jury Could Reasonably Infer that Gasco's Conduct Caused Anticompetitive Effects

Once the analysis of anticompetitive effect is recognized to include consideration of conduct which impairs competition without directly transferring resources to the monopolist, it is apparent that the jury could reasonably infer that Gasco's 1982 marketing strategy negatively impacted both OGS and competition in the Hawaiian propane market.[2] Specifically, the jury could have reasonably inferred that the purpose and effect of Gasco's conduct, *i.e.*, reducing OGS' revenues, resulted in both a lessening of competition in Oahu and the absolute prohibition of competition in the Neighbor Islands.

1. Gasco's Conduct Reduced Competition in Oahu

An assessment of anticompetitive effect requires an examination of the market in which the defendant's conduct occurred. *See Kaplan*, 611 F.2d at 291. The propane market in Oahu consisted essentially of two competitors—Gasco and OGS. Until OGS' entry in 1972, Gasco was the sole supplier of propane in Hawaii. *OGS III* at 1259. Other than OGS, there were no other competitors in the Oahu market who could realistically challenge Gasco's position.[3] *Id.* at 1269. In addition, OGS proved that entry barriers in this isolated marketplace were high, thus permitting a reasonable inference by the jury that were OGS' competitive viability to be significantly impaired, no other rival would be likely to enter the Oahu market to take its place. *Id.*

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[2] In order for this Court to reverse the jury's finding on this issue, it must conclude that the plaintiff failed to adduce sufficient evidence from which a reasonable mind could infer that Gasco's marketing program had a negative effect upon competition. *See California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 733-34 (9th Cir. 1979).

[3] The jury could reasonably infer that a third supplier of propane, Aloha Gas, did not qualify as a viable challenger to Gasco's monopoly. (T.R. 14:109-10.) Aloha's market share was less than one-tenth of one percent (Ex. 1318), a fact which even *OGS III* acknowledges supports plaintiff's contention that Aloha's presence did not evidence a breakdown of entry barriers in this market. *OGS III* at 1269.

Given an Oahu market occupied by only two rivals, the jury could reasonably infer that any program undertaken to eliminate or handicap OGS would inevitably result in a reduction in competition. *See, e.g., D & S Redi-Mix v. Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245, 1249 (9th Cir. 1982); *Helix Milling*, 523 F.2d at 1320. *See also H. J. Heinz Co. v. Beech-Nut Life Savers, Inc.*, 181 F.Supp. 452, 464 (S.D.N.Y. 1960) (recognizing the anticompetitive effect inherent in eliminating or crippling one of only three competitors in market.)

So too could the jury infer, based on substantial evidence, that the purpose and actual effect of Gasco's campaign was to cripple its only effective rival. As shown by the testimony, the purpose of Gasco's 1982 campaign was to lessen the revenues and profits of OGS. (Ex. 1161) (T.R. 2:199). "Where, as here, the defendants have acted with intent to eliminate competition, the proof of resulting injury need not be overwhelming." *D & S*, 692 F.2d at 1249. Also in the trial record is the fact that OGS lost over $400,000 in revenues as a result of Gasco's conduct. The jury was entitled to infer that had these revenues been available, OGS would have been able to finance a variety of activities, such as inprovements in its plant and equipment, expansion of its customer base or enhancement of services offered to its customers. A reasonable jury could permissibly infer, therefore, that Gasco's depression of OGS' revenues and the attendant prohibition of these activities effectively diminished the vigor of competition in the Oahu marketplace.

2. Gasco's Conduct Eliminated Competition in the Neighbor Islands

In addition, the jury could have reasonably inferred that Gasco's reduction of OGS' revenues resulted in provable anticompetitive effects in the Neighbor Islands. At the time it planned the 1982 Blitz, Gasco knew that OGS was positioned to expand to the outer islands. (T.R. 2:187-88.) One of the stated goals of Gasco's campaign, in fact, was to prevent OGS from obtaining the revenues necessary to finance such entry. (Ex. 1161.) In addition, the jury heard testimony that between 1982 and 1985 OGS did not enter the Neighbor Islands. (Ex. 1318) (T.R. 9:192). From this evidence, the jury could reasonably infer that Gasco's reduction of OGS' revenues had the effect of

eliminating OGS as a potential competitor on the Neighbor Islands. Such an elimination of competition satisfies even the most stringent definition of cognizable anticompetitive effect. *See Western Concrete Structures,* 760 F.2d at 1018.

Based on the testimony regarding the structural dimensions of the Hawaiian propane market, and the evidence regarding the purpose and actual negative effect of Gasco's sham offers on OGS, it was wholly reasonable for the jury to infer that Gasco's infliction of financial loss of OGS necessarily translated into a diminution in competition. The marketplace at issue in this case was not one populated with rivals so that the loss or handicapping of a single competitor would not adversely impact competition. Rather, it was a two-competitor marketplace in an isolated geographic area with little or no possibility of further entry. *OGS III* at 1269. Given the facts of this particular market, the jury could reasonably conclude that injury to a competitor was synonymous with injury to competition.[4]

III

CONCLUSION

For all the foregoing reasons, we respectfully request that the petition be granted and that rehearing beheld by the Court sitting en banc.

Dated: February 16, 1988

Respectfully submitted,

By /s/ ANN I. JONES
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Oahu Gas Service, Inc.

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[4] While it is arguable that the jury could have alternatively inferred that OGS' injury as a competitor did not result in a lessening of competition, it is not for this Court to substitute inferences where, as here, the plaintiff has adduced sufficient evidence to support the jury's conclusions. *Los Angeles Memorial Coliseum Commission v. National Football League,* 726 F.2d 1381, 1392 (9th Cir.), *cert. denied sub nom. National Football League v. Oakland Raiders, Ltd.,* 469 U.S. 990 (1984).

Supreme Court, U.S.
FILED
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No. 87-2096

In the Supreme Court of the United States

October Term, 1987

OAHU GAS SERVICE, INC.,

Petitioner,

v.

PACIFIC RESOURCES INC. and GASCO, INC.,

Respondents.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I.

PRELIMINARY STATEMENT

To dissuade the Court from granting certiorari, the defendants assert that the plaintiff's petition is vague and fact-intensive, requiring the review of voluminous testimony and extensive exhibits. Not so. Plaintiff's petition presents two discrete legal issues:

(1) Is the court of appeals permitted to reject a jury's factual determination that a monopolist had no legitimate justification for its conduct, or must the court exonerate a monopolist, as a matter of law, if its articulated justification is supported by some evidence?

(2) Is a Section 2 plaintiff required to show that the defendant's conduct resulted in a diversion of customers and revenues, or is it enough for the plaintiff to prove

that the conduct had the anticompetitive effects of reducing revenues and profits and foreclosing entry into new markets?

In attempting to trivialize the plaintiff's petition, the defendants overlook these two important questions of law. Following this Court's decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), a serious debate has erupted as to when and under what circumstances a monopolist's proffered justification for its conduct exonerates it from antitrust liability as a matter of law. So too has controversy emerged as to what kind of marketplace effects must be shown by a plaintiff in order to satisfy the injury requirements of Section 2.

It is not enough, therefore, for the defendants to evoke the traditional fact-intensive "bogeyman" as their only defense to certiorari. The plaintiff presents important issues of law that need to be resolved by the Court. For these reasons, the plaintiff respectfully requests that its petition for certiorari be granted.

II.

AS IN *ASPEN*, IT IS THE FUNCTION OF THE JURY TO DETERMINE THE CREDIBILITY OF THE DEFENDANTS' PROFFERED JUSTIFICATION FOR THEIR CONDUCT.

As articulated by this Court in *Aspen*, a monopolist may escape Section 2 liability where its conduct is motivated by legitimate business considerations. 472 U.S. at 605. The inquiry, therefore, encompasses two aspects: (1) A determination that the stated justification

is "legitimate" as defined under *Aspen*[1]; (2) A determination of whether the "legitimate" justification articulated by the defendant *in fact* motivated its conduct. The Ninth Circuit in *OGS* ruled on both of these issues as a matter of law. The court holds that where a monopolist advances a business justification that is "legitimate," as a matter of law, it must be exonerated from Section 2 liability. (Opposition Brief at 17.) Overlooked completely is whether, given evidence to the contrary, the defendants' actions were actually motivated by those legitimate concerns or whether the stated justification was false and pretextual.

The error inherent in disregarding this factual inquiry into a defendant's actual motivations for its conduct was recently identified in a Fifth Circuit opinion, *Bell v. Dow Chemical Co.*, 847 F.2d 1179 (5th Cir. 1988). In *Bell*, the court of appeals reversed the district court's finding that the defendant's proffered justifications immunized it from Section 2 liability as a matter of law. Where the plaintiff offers "significant evidence undercutting the credibility of the justifications offered," the determination of whether the defendant's conduct was in fact motivated by its procompetitive justifications should be left to a jury. *Id.* at 1186.

In *OGS*, as in *Bell*, the plaintiff presented evidence that controverted the defendants' contention that its

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[1]The plaintiff disputes the defendants' proposition that the validity of the defendants' business justification is purely a question of law. (*See* Plaintiff's Opening Brief at 12-15.) Even assuming, however, that the Ninth Circuit's determination of this issue is preclusive, the court failed to recognize a distinction between its inquiry as to the legitimacy of the justification and the second question of whether the asserted justification truly motivated the challenged conduct.

abandonment of the propane unit was based on legitimate business considerations regarding the project's profitability.[2] Given two different explanations for the defendants' actions, the jury was instructed to decide whether the project's termination was supported by legitimate business reasons, or was instead a deliberate effort to injure a smaller rival. The choice presented to the jury was clear. As counsel for the plaintiff stated in closing argument, "I don't want you to second guess

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[2]The defendants improperly assert that the evidence regarding their reason for abandoning the refinery was "uncontroverted." (Opposition Brief at 6.) The plaintiff vigorously challenged the defendants' assertion that they predicated their decision to terminate the propane refinery project based on the uncertainty of profits during price controls. The evidence rebutting the defendants' testimony included: (1) the absence of any contemporaneous analysis showing the proposed project to be unprofitable; (2) the inconsistent testimony of PRI's Chairman of the Board as to the reasons for halting the project and the identity of the decision-makers; (3) the willingness of the defendants to proceed with plans to refine new products, such as gasoline, that were subject to the same uncertainty from government price controls as propane; (4) substantial documentary evidence and testimony showing that the defendants believed that producing additional propane would be "detrimental to Gasco's marketing in the long term" because OGS would receive at least some portion of that increased supply (Ex. 1211); and (5) other decisions by Gasco that had the effect of limiting Chevron's ability to increase the supplies of propane available in Hawaii (Exs. 724 and 794). In addition, the plaintiff attacked the defendants' reliance on a Chevron refinery study unearthed during discovery, as support for their contention that the planned recovery unit would have generated net losses. (Ex. 2656.) Chevron's study did *not* conclude that its propane unit was unprofitable, nor could Chevron's experience be generalized to a vertically integrated propane distribution entity such as the defendants. Given the costs and uncertainty of supply that Gasco ultimately suffered because of the abandonment of the unit, a jury could have reasonably inferred that the defendants' real concern was not the possibility of unprofitability but rather the competitive inroads being made by its aggressive smaller rival.

whether [the defendants] should or should not have built the refinery. All you need to look at is whether *the reason* they did not build it was to contain OGS." (R.T. 18:19.) (emphasis added.) Had the jury decided that the defendants' conduct had been motivated, even in part, by a legitimate concern that the operation would lose money, it was instructed to exonerate the defendants. Similarly, if the jury did not find credible the defendants' proffered rationale, it was free to reject it and conclude that the defendants' true reason for abandoning the unit was monopolistic, *i.e.*, to injure its smaller rival.

Having performed its proper function of determining the credibility of witnesses and weighing the evidence, the jury concluded that the defendants' decision to halt construction was motivated solely by their desire to contain OGS and eliminate competition. The jury was not asked, nor did it assess, the persuasiveness of the defendants' competitive justification. Rather, it simply did not believe that such justifications were, in any degree, the true reasons for the defendants' conduct.

Read together, the Ninth Circuit's position in *OGS* and the Fifth Circuit's position in *Bell* conflict. The Ninth Circuit reads *Aspen* to preclude antitrust liability where the monopolist asserts a procompetitive or "legitimate" justification for its conduct. The jury is left out of the inquiry. Conversely, the Fifth Circuit requires not only that a legally sufficient justification be proffered, but also that this rationale be what actually motivated the monopolist's actions. According to *Bell*, this question of motivation, where the plaintiff has evidence that the stated justification is a pretext for monopolistic purposes, is reserved for the jury.

This intracircuit conflict evidences the confusion regarding the role of the court and of the jury in

determining whether a monopolist is subject to Section 2 liability. Applying the Ninth Circuit test to the facts presented in *Aspen,* the court would have reversed the jury verdict merely because the defendant offered a "justification" which the jury found nonexistent - as did the jury in this case. The need to clarify when and under what circumstances a jury is entitled to assess a monopolist's conduct is evident from the contradictory outcomes in *OGS* and *Bell.* For this reason, the plaintiff respectfully believes that certiorari on this important question of law is appropriate.

III.

THE NINTH CIRCUIT'S NEW REQUIREMENT FOR PROOF OF ANTICOMPETITIVE EFFECT UNJUSTIFIABLY NARROWS THE REACH OF SECTION 2 LIABILITY.

In its final opinion, the Ninth Circuit abruptly reversed its two previous opinions and held that Gasco's "blitzkrieg" of OGS' customers was lawful. In so finding, the Ninth Circuit freely acknowledged that the plaintiff had shown that Gasco's conduct was not undertaken to attract customers, but rather "to cut into Oahu's profits." (Appendix C at 21.) So too did the appellate court concede that Gasco's "campaign to harm or destroy rivals through deceptive marketing practices smacks of unfair competition." (*Id.* at 22.) Incredibly, however, the Ninth Circuit exonerated the defendants based on the simple fortuity that OGS, by drastically reducing its own prices and profits, was able to retain all of its customers.

The defendants have consistently mischaracterized Gasco's conduct as "above average total costs" predatory pricing. (Opposition Brief at 18.) The Gasco "blitzkrieg", however, cannot be viewed so simplistically. To engage

in a strategy of predatory pricing, the monopolist must reduce its own prices in order to attract its rival's customers. This reduction in price has the attendant effect of causing the monopolist to incur short-run losses in revenues and profits. These losses will deter a monopolist from engaging in price predation unless it is confident that it will be able to recoup these revenues once its competitors are eliminated. Thus, this Court and scholars have agreed that while predatory pricing exists, there are strong economic and pragmatic reasons why it will be relatively rare. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 107 (1986).

Gasco's "blitzkrieg" of OGS' customers, however, shares none of the essential features of predatory pricing. Gasco's offers to OGS' customers were shams, not intended to attract customers to itself, but rather meant only to force its smaller rival to renegotiate its existing contracts. (Appendix C at 21.) Thus, Gasco was not required to sustain the revenue losses that necessarily accompany a monopolist's decision to price its own products predatorily. By targeting only its rival's customers with offers that it never intended for them to accept, Gasco avoided the business risk associated with predatory pricing. (*Id.*) Without the deterrent effect of lost revenues, a strategy of sham offers is neither irrational nor self-destructive. In fact, but for the intervention of the district court, Gasco could have sustained the "blitzkrieg" indefinitely.

What Gasco stood to gain from forcing OGS to lower its prices is evident from the record. When supplies of propane became plentiful in the early 1980's, OGS was poised to expand to the outer islands, where Gasco maintained a 100% monopoly. Gasco appreciated this

threat to its monopoly. (Ex. 1161.) Gasco also appreciated that the key to OGS' ability to expand was sustained revenues from existing customers. By reducing OGS' revenues, Gasco could halt its rival's expansion to the outer islands. (*Id.*) In effect, what Gasco devised was a costless way to diminish its competitor's viability and foreclose competition in a significant market segment.

That Gasco's "blitzkrieg" effectively foreclosed OGS from the outer islands' propane market for several years should have evidenced the anticompetitive effect of the conduct. The Ninth Circuit, however, imposed an additional requirement. To prove anticompetitive effect, the court required the plaintiff to show that the defendants' conduct diverted revenues or patrons to the monopolist. Because of the fortuity that OGS was able to retain its customers by matching Gasco's sham offers, the court concluded that no anticompetitive effect had been shown.

The error of the court in narrowly defining the type of market impact that is necessary to prove anticompetitive effect is apparent. Anticompetitive effect, as demonstrated in this case, can be produced without the loss of a single customer. Where, for example, a competitor's growth is slowed through the monopolist's imposition of higher costs (and, consequentially, diminished revenues), the conduct is condemned. *See United Air Lines, Inc. v. CAB,* 766 F.2d 1107, 1115 (7th Cir. 1985) (Posner, J.). To grant an antitrust exemption from such blatantly anticompetitive conduct based on the imposition of a wholly unwarranted requirement of diverted customers or revenues is a radical departure from existing case authority. The Court, therefore, should grant certiorari to reverse this

unnecessary and unjustifiable restriction on the coverage of Section 2 of the Sherman Act.

IV.

CONCLUSION

The Ninth Circuit's opinion in *OGS* constitutes a serious intrusion into the efficacy of Section 2 and the jury system. In reversing the jury's verdict, the Ninth Circuit has extended an invitation to monopolists to restrain competition with total impugnity. For these reasons, and in order to give meaning to Section 2 of the Sherman Act as explained by this Court in *Aspen*, the plaintiff respectfully urges that its petition for certiorari be granted.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

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ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on August 15,1988, I served the within *Petitioner's Reply Brief* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

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I declare under penalty of perjury that the foregoing is true and correct. Executed on August 15, 1988, at Los Angeles, California.

Betty J. Malloy
(Original signed)